Supreme Court of the United States

October Term, 1897.

EX PARTE. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for Its Review and Determination the Case of The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Nellie Phinney, Executrix of the Estate of Guy C. Phinney, Deceased, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, OPPOSING PETITION FOR CERTIORARI.

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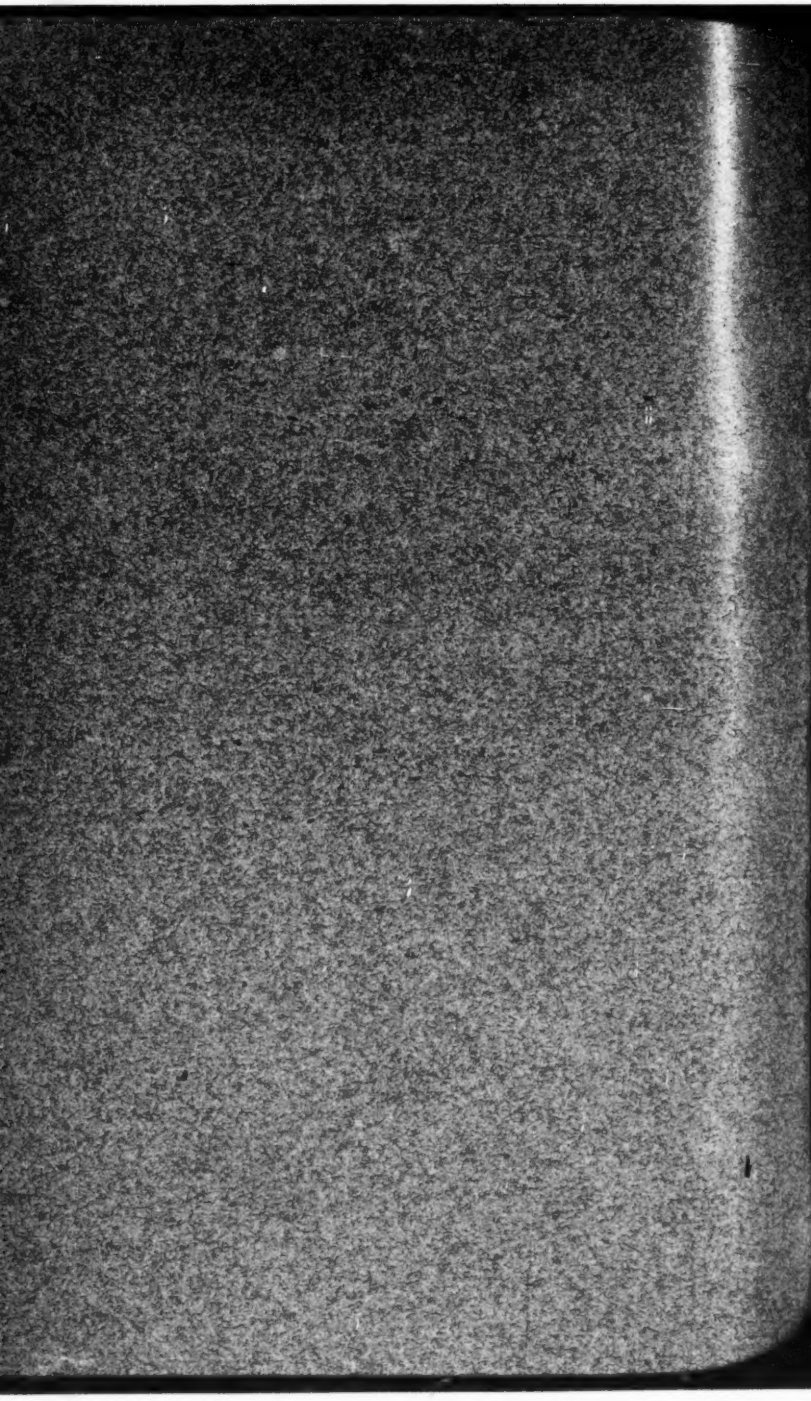

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STATEMENT.

The above-named respondent brought an action against the petitioner on a life insurance policy issued on the life of her deceased husband. The case was tried before the Honorable C. H. Hanford, in the circuit court of the United States for the ninth circuit, district of Washington. The respondent recovered judgment, and the petitioner claims it sued out a writ of error in the circuit court of appeals for the ninth circuit. The respondent made a motion to dismiss the writ of error on the ground, among others, that the writ of error had not been filed in the lower court. This motion was argued before the circuit court of appeals,

and at the same time the case was argued upon its merits. The circuit court of appeals, after having taken both matters under advisement, dismissed the writ of error on the ground that there was no evidence that the writ of error had been filed in the court below, and that it therefore had no jurisdiction to consider the merits of the case.

The original writ of error had no file-mark nor anything else upon it to indicate that it had ever been filed in the court that tried the cause. Neither the appearance or fee docket had any entry showing that the writ had ever been filed. On the contrary, it clearly showed in a negative way that such writ had not been filed in that court. Every other paper in the case, numbering over one hundred, that should be filed was entered in such books as having been filed and a fee charged for the same. (See Record, pp. 426–435.) Only an inspection of the above record, which is an exact copy of the appearance docket and fee book, together with the fact that there was no file-mark on the original writ, will show how significant these facts are. Petitioner undertook to supply this record not by writ of certiorari, but by affidavits.

It is true, as stated in the petitioner's brief, that the second premium on the policy of insurance on the life of Guy C. Phinney was not paid. It is equally true, according to the testimony of petitioner's witness, that Guy C. Phinney wanted to pay the premium; that he tendered the company the premium. It is likewise true that the company refused to accept the premium, it wanted to forfeit the contract—wanted to get rid of the risk—because, in the language of the agent, it considered him "a very bad risk." (See letter of agent, Record, pp. 187, 188.)

Why should the petitioner complain because it did not get a premium it refused to take? We will make a fuller statement of the facts relating to the merits in the latter part of the brief, though we think the merits of the case cannot be considered on this application, and will only do so because petitioner has seen fit to enter that field, making it incumbent on us to do so.

Argument.

This is one of that class of cases made final in the circuit court of appeals, except when certified up by such court or when required to be certified up by this Court.

It has been settled by the decision of this Court in a number of cases that this is a "branch of its jurisdiction "which should be used sparingly and with great caution, "and only in cases of peculiar gravity and general impor- "tance or in order to secure uniformity of decision." In view of the statute as construed by this Court this present application for a writ of certiorari should be denied for the following reasons:

I. It has been held repeatedly by this Court that it was the filing of the writ of error in the court which rendered the judgment that gave this Court appellate jurisdiction. In Brooks *vs.* Norris this Court, speaking through Chief Justice Taney, uses this language:

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the records from the inferior to the appellate court, and the power of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may be issued by the clerk, or the day on which it is tested, are not material in deciding the question."

Brooks *vs.* Norris, 11 Howard, 204, on p. 208.

To the same effect are the following decisions:

Mussina *vs.* Cavazos, 6 Wall., 355, 363.

Cummings *vs.* Jones, 104 U. S., 419.

Scarborough *vs.* Pargoud, 108 U. S., 567 (2 S. C. R., 877).

Pollys *vs.* B. R. Imp't Co., 113 U. S., 81 (5 S. C. R., 369).

Credit Co. *vs.* R'y Co., 128 U. S., 258 (9 S. C. R., 107).
Farrar *vs.* Churchill, 135 U. S., 609 (10 S. C. R., 771).
U. S. *vs.* Baxter, 51 Fed. (C. C. A), 624.
U. P. R'y Co. *vs.* C. E. R'y Co., 54 Fed. (C. C. A.), 22.
Warner *vs.* T. & P. R'y Co., 54 Fed. (C. C. A.), 920, 921, 922.
Stevens *vs.* Clark, 62 Fed. (C. C. A.), 321.
Threadgill *vs.* Platt, 71 Fed., 1.
Crippin *vs.* Livingston, 12 Fla., 638.
Wright *vs.* Hughes, 2 Green (Iowa), 142.

It is provided in section 11 of the act of March 3, 1891 (see 517) the act established by the circuit court of appeals:

"All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error and the conditions of such allowance as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

THE PETITIONER ADMITS THE LOWER COURT CORRECTLY HELD THAT THE WRIT MUST BE FILED.

The petitioner admitted in its petition for rehearing before the circuit court of appeals that "a writ of error is not brought until it is filed with the court to which it is addressed and whose record is thereby to be removed."

Petitioner's brief on rehearing, Record, p. 457.

Thus it is seen that no complaint is made of the decision of the circuit court of appeals that its jurisdiction did not attach until the original writ of error was filed with the clerk of the lower court. Its only complaint is that the court wrongfully decided that there was not sufficient evidence in the record that the writ of error was filed with the clerk of the court that tried the case.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT IN THIS PARTICULAR CASE THERE WAS NO EVIDENCE OF THE FILING OF THE WRIT DOES NOT RAISE A QUESTION OF SUCH PUBLIC IMPORTANCE AS TO GIVE THIS COURT JURISDICTION TO ISSUE ITS WRIT OF CERTIORARI.

It being admitted that it was the filing of the writ which gave the circuit court of appeals jurisdiction, no complaint is made of the circuit court of appeals for so holding; then it follows that the only complaint that can be made, the only question that is to be considered by this Court, is: Does the decision of the circuit court of appeals holding that there was no evidence of the filing of the writ raise a question of grave public importance or is it one in which there is a conflict in the decisions of the court? Both of these questions must be answered in the negative.

(*a.*) It was the intention of Congress that the circuit courts of appeals should have final jurisdiction in a certain class of cases of which this is one, except in extraordinary instances. This being true, it would seem that, if the decision of the circuit court of appeals is to be final in any matter, its decision that a record of a lower court is not properly before it for review ought to be in that category. Is this Court going to make its writ of certiorari serve the purpose of a writ of mandamus and compel the lower court to consider a

case on its merits when such court has decided that the party in attempting to sue out its writ has failed to do the one necessary act to give it appellate jurisdiction, viz., file the writ? The second section of the act establishing the circuit courts of appeals provides that each circuit court of appeals "shall prescribe the form and style of its deal and "the form of writs and other process and procedure as may "be conformable to the exercise of its jurisdiction as shall "be conferred by law."

In other words, each circuit court of appeals has complete power to regulate the practice and procedure in its own court and compel a compliance therewith on pain of dismissal. The decision attacked is one regulating the practice in the ninth circuit court of appeals of suing out a writ of error to a court within its circuit. It requires the filing of the writ and preserving the record thereof. The petitioner is in exactly the same condition had it violated any other rule of the circuit court of appeals and had suffered a dismissal therefor.

Instead of being a question of great public importance we cannot imagine a more simple question nor one of less importance to the public at large. The law once being settled (and it has been settled many years by numerous decisions) that it is necessary to file the writ, every lawyer knows that the best evidence of such filing is the propor endorsement of such fact on the writ, and it will always be secured by the careful lawyer. Every lawyer preparing for the review of a cause in the circuit court of appeals gives his precipe for the desired record and carefully examines the same after it is prepared. It is the duty of such lawyer to see that it is properly prepared. If it does not contain all the matter desired, he has the power by mandamus, etc., to compel its correct preparation. By what right or reason, then, can a party complain if his writ is dismissed if he has failed to preserve any evidence of the filing of such writ, especially when

the filing of such writ is jurisdictional? If this writ of error was filed in the lower court, as claimed by petitioner, then both attorneys and clerk were very careless about preserving the evidence of it. Is the question of whether this particular writ was filed or whether there was carelessness in preserving evidence of it, one of great public importance? It may be to the litigants in this case, but cannot be to the public generally. If this Court should cause a writ of certiorari to issue and finally decide that there was sufficient evidence of the filing this particular writ, what particular rule of law important to the public would it decide? None whatever. Between what courts are there conflicting decisions that it would settle? None whatever. Did the clerk of the lower court refuse to indorse the writ as filed? No. Did the attorneys request the clerk to file the writ? No such request was made. Did the attorneys file a præcipe or deliver to the clerk a præcipe for the filing of the writ? No such claim is urged.

II.

NO CONFLICT IN THE DECISIONS.

Petitioner has not undertaken to show, nor could it successfully, that there was a conflict in the decisions of the various courts of appeals such as would give this Court jurisdiction to issue its writ of certiorari. It has thus failed to bring this cause within any of the rules laid down by this Court under the act of Congress as construed in the cases of American Construction Co. *vs.* R. R. Co., 148 U. S., p. 372; Law Ow Bew *vs.* United States, 144 U. S., p. 47; *In re* Woods, 143 U. S., p. 202.

III.

THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN DISMISSING THE WRIT OF ERROR, AS THERE WAS NO EVIDENCE THAT THE WRIT HAD BEEN FILED.

As we have already shown, the dismissal of the writ of error raises no question of sufficient importance to give this Court jurisdiction to issue its writ.

But, we take it, in no case would this Court issue its writ unless petitioner shows *prima facie* error.

We will very briefly discuss the points, and will attach to this brief the brief used in the court below, and earnestly ask the Court's attention to it, if it should consider this phase of the case.

It is admitted that writ of error must be filed or lodged with the court wherein the case was tried.

Then the only question open for discussion is, Was there evidence of such filing in the record before the circuit court of appeals? We say there was none.

The law provides that the original writ of error shall be annexed to the record and returned to the circuit court of appeals. It is admitted that writ of error had nothing upon it to show that it had been filed in the lower court. It is also admitted by petitioner that the indorsement of the filing of the writ on such writ would be the best evidence. This is wholly wanting. What other evidence is there that it was ever filed or even lodged with the lower court? We say, none. Petitioner claims that it is shown in two ways: The affidavit of the clerk of the lower court, filed in the circuit court of appeals, shows that fact, and that the citation reciting therein that writ had been filed is evidence of such fact; also that the return of the clerk reciting the fact that the fees for transcribing had been paid.

1. *The affidavit of the clerk of the circuit court should not have have been considered by the circuit court of appeals, nor can it be considered by this Court.*

If the record before the circuit court of appeals was incomplete (and it is admitted by counsel that it was, in not affirmatively showing the filing of the writ), there was one way, and one way only, to supply the omission, and that was by suggesting a diminution of the record and applying for a writ of certiorari to complete it. By obtaining a proper return to such writ, such omitted facts would then become a part of the record.

It would be a strange, yes, dangerous, rule that would allow parties to supply records by affidavits. Take this case, for example. The matter of the dismissal came on for hearing on the 4th day of May, 1896. On that day, without any notice to defendant in error, petitioner filed the affidavit of Mr. Hopkins, the clerk; Mr. Strudwick, one of the attorneys of record, and Mr. Quilter, deputy marshal, to complete and supply facts not otherwise appearing of record. (See Record, pp. 414, 418, and 420.) It is not by the record proper, but upon the affidavits of these parties, especially that of Mr. Hopkins, that the petitioner relied to show that the writ of error was in fact filed. To state these facts is really all the argument needed to show that such extraneous matter must be disregarded.

If one fact can be supplied in such a manner, then any other matter can be brought into the record in the same way. Supposing a party neglected to show the necessary jurisdictional fact of diversity of citizenship, could such party supply it in the appellate court by affidavit? Supposing a defendant in error moves to dismiss a writ of error on the ground that he was not served with a citation, and the record failed to show that fact, could it be supplied by affidavits of the clerk or marshal that such a citation was in fact issued and served on defendant in error? Certainly

not. The only way would be to suggest a diminution of the record, obtain a writ of certiorari, and in that manner bring any omitted part of the record of the lower court into the record of the appellate court.

We are not without authority on this proposition. The same thing has been attempted before in this Court, and such matters not properly in the record have always been disregarded. On this question Chief Justice Taney, speaking for the Court, says:

"*Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the circuit court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court.*" (Hudgins *vs.* Kemp, 18 How., 530, 534.)

"The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do:

"'The fact that the clerk of the circuit court in preparing transcripts on appeal to this Court labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules.' (Richardson *vs.* Green, 130 U. S., 104; 9 S. C. R., 443.)

"*And this Court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record* (Reed *vs.* Marsh, 13 Pet., 153; Fisher *vs.* Cockrell, 5 Pet., 248, *254*), and if the clerk cannot by certifying it make that of record which is not, *certainly counsel cannot patch up a record by recitals in draft orders, bonds, or other papers. A recital in a citation, even that an allowance of an appeal was obtained at a certain time, does not prove the fact.* (Edmondson *vs.* Bloomshire, 7 Wall., 306, *313*.)

"So in Sage *vs.* R. Co., 6 Otto, 712–'16, the Supreme Court says:

"'It is true that the bond accepted in this case recites an allowance of an appeal in open court, *but this is mere sur-*

plusage, etc." "The return of process contained in the record on appeal must control, etc. *No presumption can be indulged that there was some other and different service of process* made from that which appears in the record.' (Lonkey *vs.* Keys S. M. Co., S. C. of Nevada, and cases cited, 17 L. R. A., 351.)

"Presumptions cannot controvert facts, and there are no presumptions in favor of the jurisdiction of the United States courts.

"'*An unnecessary statement in the marshal's return is not conclusive of the court's jurisdiction.*'"

The Lindthrup, 70 Fed., 718.

This being the well-established practice, it comes with very poor grace on the part of petitioner to complain of the clerk in not giving plaintiff in error a perfect record. It had it within its power to get a perfect record if one existed. It has no one to blame but itself if it failed in getting the whole of the record before the appellate court. The very fact the clerk was willing to make affidavits, etc. (a purely voluntary act, wholly outside of his official duties), to be used for the purpose of supplying defective records, shows he was not in any sense acting in bad faith or refusing to give a petitioner such record as it desired.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.), 883, 885, the Court uses language quite appropriate for this case, wherein it says:

"It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court, for which the appellant is not responsible. We cannot assent to this. * * * *It was not the business of the clerk of the circuit court to obtain such an order, file it in his office, or transmit it to the court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same.*"

See also Warner *vs.* T. & P. R. Co. (54 Fed., 920):

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals for writs of error. This is the office of parties or of

their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary indorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do."

2. THE FACT THAT THE WRIT WAS ATTACHED TO THE RECORD IS NO EVIDENCE THAT IT WAS FILED IN THE COURT BELOW.

There is one other proposition we desire to call to the Court's attention, which was discussed and urged strenuously by petitioner in the lower court (though omitted here, Judge Gilbert bases his decision largely upon it, and in that way it is here presented)—that is, the original writ was attached to the record which was transmitted to the circuit court of appeals, and therefore, as claimed by petitioner, must have been filed in the lower court. If the clerk of some other court than the clerk of the court which sent up the record had prepared the writ ready for delivery, then there might be some ground for saying it had gotten into the hands of the plaintiff in error, and by it filed with the court which tried the case; but these are not the facts. Mr. Hopkins, the clerk, prepared the writ ready for delivery to the plaintiff in error. There is no evidence that he ever delivered it to the plaintiff in error or its attorneys, and it was by them returned to such clerk and filed by or with such clerk, nor is there any presumption of such a fact. The only thing shown by the fact that the original attached to the record was transmitted to the appellate court is that at some time such writ was in the hands of the clerk of the court below prior to the time the record was transmitted. But such was the case when the clerk had prepared it, signed it under the seal of the court, and was allowed by the court, ready for the delivery to the plaintiff in error. This does not show it ever got into the hands of the plaintiff in error, and that it delivered it to the clerk of the lower

court for filing, and that the clerk filed it; all of which is jurisdictional and must be done, and which facts must appear of record. It has always been held that jurisdictional facts must affirmatively appear in the record.

3. EVEN IF THE AFFIDAVIT OF THE CLERK COULD BE CONSIDERED A PART OF THE RECORD, IT DOES NOT SHOW THAT THE WRIT WAS FILED.

Even if affidavit of the clerk is considered a part of the record, it and the record show conclusively that in fact the writ was not filed. On this proposition we will simply refer this Court to the decision of the circuit court of appeals, found on pages 138–146 of the Record. We also earnestly ask the Court's attention to the annexed brief, used in the court below, pages 34–50.

4. IF THE COURT SHOULD BE OF THE OPINION THAT THERE WAS EVIDENCE OF THE FILING OF THE WRIT, YET THERE IS NO EVIDENCE SHOWING WHEN IT WAS FILED.

The citation in this case was served on respondent (defendant in error) shortly after it was issued. Before appearing, counsel examined the record, both in the lower court and upper court, to see if the writ of error had been filed. It could find no record of such writ having been filed, much less the date of such filing. It found by such search that the citation was improperly issued, because no citation could issue until the writ was filed. A party cannot be compelled to appear in an appellate court until such appellate court has jurisdiction, and we have shown *supra* that it is the filing of the writ that gives the appellate court jurisdiction. Defendant in error having found no writ of error was filed and that the citation was therefore without force or effect, appeared specially and moved to dismiss.

Again, if the writ of error was filed after the issuance of

the citation (and surely there is no record showing that it was filed before), such citation would be useless and void and could be disregarded, as it was by defendant in error appearing specially, as she did, and moving to dismiss. Of course, it is contended that the affidavit of the clerk establishes the date and the alleged filing, but we have already shown *supra* that such affidavit must be disregarded by this Court. Our discussion of the foregoing points made on the motion to dismiss in the court below has been brief, and we again ask the Court's attention to the annexed brief, which was filed in the court below and which discusses the points far more fully.

STATEMENT ON MERITS.

We think the portion of petitioner's brief and petition relative to the merits of the case is not properly before this Court on this application. But, if it is not too great a burden on this Court, we are glad that petitioner saw fit to open this door, because this Court will see that even had the case been considered on the merits, the result would have been the same. The circuit court of appeals had the merits before it when it dismissed the case, the appearance of defendant in error being special.

In the following statement we shall assume that witnesses of the petitioner told the truth and will treat its story as the correct one.

In September, 1890, Guy C. Phinney applied to petitioner for a policy of insurance in the sum of $100,000. The application contained this provision: "*This application is made "to the Mutual Life Insurance Company of New York, subject "to the charter of the company and the laws of the State of New "York.*" (See Record, p. 7, application.) Upon this application the policy in question was issued. By the terms of the policy the application was made a part of it. The policy further provided that the place of the performance of the contract was the city of New York, State of New York. All these matters were inserted in the printed part of the application and policy by the petitioner. By what right or reason can it complain if the lower court gave full force to the provisions thus inserted in the contract by the company presumably for its own benefit?

The payment of the first premium on the policy is admitted by petitioner.

The following are the facts relevant to the attempted payment on the part of the insured of the second premium, as

related on the witness stand by the company's representative:

About ten days before the second premium became due, Mr. Phinney called to arrange for its payment. He told the agent that he did not have the cash with which to pay the premium, but desired him to take his note for the full amount for thirty or sixty days. (It was already in evidence that he had paid part of the first premium by note.) The agent informed him that he could not take his note for the second premium, as he must respond to the company with cash, but requested Mr. Phinney to get the money with which to pay this second premium; that thereupon Mr. Phinney left him, and returned again about four days before the due date of the second premium and again requested the agent to accept his short-time note in payment of the premium; that again the agent informed him that he could not take his note, but that Mr. Phinney must get the cash; that within thirty days after the due date of the premium several like conversations occurred between Mr. Phinney and the agent, each time Mr. Phinney pressing the agent to accept his short-time note and each time the agent instructing Mr. Phinney to get the cash; that at the end of thirty days Mr. Phinney, having secured the money, tendered the second premium to the agent. The agent then refused to take the second premium until Mr. Phinney should secure a certificate of good health. Mr. Phinney informed the agent that he was unable to get such a certificate. It might be well to here remark that no evidence was offered to prove that during this transaction the health of Mr. Phinney had become impaired, nor could such a fact have been established had it been attempted. (Record, pp. 260, 265.)

About this time the agent returned a number of receipts to the general agent at San Francisco enclosing a letter of which the following is a copy:

"SEATTLE, WASHINGTON, *Nov.* 26, 1891.

"A. B. FORBES, Esq., *Gen'l Ag't.*

"DEAR SIR: In compliance with your request, I regret having to return the undernoted renewal receipts:

"422,198, Phinney. (Offered to pay, but in ill health.)

"Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for) will be reported in next acc't.

"Yours very truly, F. L. STINSON."

(Record, page 187.)

It will be observed in the above letter that the agent instructed his general agent that he expects to reinstate a number of the policies mentioned in his letter. About the time this letter would reach New York, back comes a telegram from New York to Mr. Forbes, general agent, which he repeats to Mr. Stinson, at Seattle. Mr. Stinson replied to this telegram by letter, repeating the telegram, as follows:

"SEATTLE, WASHINGTON, *Dec.* 10, 1891.

"A. B. FORBES, Esq., *Gen'l Ag't.*

"DEAR SIR: Your wire of the 9th inst., reading 'If tendered, decline acceptance September premium No. 422,198, Phinney,' duly received.

"*This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.*

"Yours very truly, F. L. STINSON."

(Record, p. 188.)

These letters, written at the time, show conclusively:

(1.) That Mr. Phinney actually tendered the second premium.

(2.) It shows equally conclusively that the company, for reasons best known to itself, was desirous that Mr. Phinney's policy should be forfeited.

One of the reasons that the company were so anxious to terminate Mr. Phinney's risk is suggested by a report made to the company by its inspector of risks, of which the following is a copy:

"No. 422,198; amount, $100,000.
"Name: Guy C. Phinney.
"Residence: Seattle, Washington.
"Business: President City National bank.
"Date of investigation: January 22, 1892.

"*Remarks.*

"Financially, all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

"(Signed) STARK."

(Record, page —.)

Now, from the above state of facts, whose fault was it that the company was not paid its premium? Did Mr. Phinney neglect or refuse to pay his premium? Did he abandon his policy? Most certainly not. The only reason that the company failed to receive its premium was that it would not accept it, and the reason it did not accept it, as stated in its agent's letter, was the fact that he was a very bad risk. Apparently the company reasoned thus: If we accept Mr. Phinney's premium we will soon be compelled to pay his executrix the full face of the policy. We have a chance to avoid this contingency, and we will take it by refusing to accept his premium. This was done at a time when the company, as a matter of law, could not legally refuse payment of the premium under its contract. The contract was a New York contract, and governed by its laws. The legislature of New York had passed a law requiring insurance companies to give thirty days' warning before it could forfeit a contract of insurance. This statute provided the printed notice to state to the insured that if he did not pay

his premium within thirty days from mailing the notice it would forfeit its contract.

From the above evidence it is very clear, had the company at any time notified Mr. Phinney, as the statute required, "Pay your premium within thirty days from the mailing of this notice or we will forfeit your contract," Mr. Phinney would have complied with such notice; but this apparently is just what the company was anxious to avoid.

The statute is set forth in full on pages 2 and 3 of the petition for this writ.

This statute has been considered by many courts, and they have all held that the only way a policy of insurance can be forfeited is by conforming strictly to the provisions of the act. The main feature of this act is that an insurance company shall not have the power to forfeit a policy unless it mails the prescribed notice. Courts have held if the notice served is not strictly in conformity to the statute it is unavailing. In this case the company in open court *disclaimed having sent any notice.* (See Record, p. 192.) So, if the statute is applicable, there can be no question but that the company is liable.

By way of prelude to the argument, we will cite the court to the following cases where this statute was before various courts and where it was strictly enforced:

Carter *vs.* Ins. Co., 110 N. Y., 15.
Phelan *vs.* Ins. Co., 113 N. Y., 47.
Baxter *vs.* Ins. Co., 119 N. Y., 450.
De Frace *vs.* Ins. Co., 136 N. Y., 144.
McDougal *vs.* Ins. Co., 135 N. Y., 551.
Griffith *vs.* Ins. Co., 101 Cal., 627.
Warner *vs.* Ins. Co., 58 N. W., 677; S. C., 101 Mich., 157.
Griesemer *vs.* Ins. Co., 10 Wash., 202.
Hicks *vs.* Ins. Co., 9 C. C. A., 215.
Ins. Co. *vs.* Fields, 26 S. W., 280 (Tex.)
Phinney *vs.* Ins. Co., 67 Fed., 493.

So the only question of any importance on the merits is, Was this statute a part of the contract in question?

I.

This policy of insurance was a New York contract.

The contract of insurance was a New York contract, for the following reasons:

1. The parties intended New York should be the place of contract and plainly expressed their intention therein.

2. The legislature of New York intended to deprive all insurance companies chartered by it of the power to forfeit policies of insurance, except in the manner provided by statute, no matter where such contract was made. This can be demonstrated in two ways:

a. The court of appeals of New York has decided such was the meaning of the act.

b. The language of the act is subject to no other construction.

1. The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon the receipt of the premium, of which it acknowledges the receipt; the premiums were all payable in New York. The proofs of death were to be delivered at the home office of the company in the city of New York. The policy when it matured was payable in the city of New York. The policy was to be forfeited, if at all, by the non-payment of a premium at the home office in New York. In other words, New York was the place of performance in every particular. If any default occurred, it occurred in New York. If the policy was ever forfeited, it was forfeited in New

York. This shows clearly that the parties intended that the laws of New York should govern as to the liabilities of the parties and be the place of contract. That this intention of the parties might be made clear, that no question might arise concerning the intention of the parties, the insurance company inserted in the printed form of the application, which is made a part of the contract, the following agreement: "This application is made to the Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the State of New York." Under these circumstances, can the insurance company say that it did not intend New York to be the place of contract?

On the foregoing facts we think the law is well settled.

It has been held by this Court in numerous cases that a contract is to be construed by the laws where such contract is wholly to be performed. In a recent case Mr. Justice Harlan, speaking for this Court, used this language:

"We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling, with interest at the rate of 5 per cent. per annum from date, the interest to be paid semi-annually on named days, 'on presenting the proper coupons for the same at the house of Palmer, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.' The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of 7 per cent., fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed; for, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, on p. 48, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by

Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. It is an English security, and so intended by the parties.' Referring to these and many other cases, this Court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124–136, that the law upon which the nature, interpretation, and validity of a contract depended was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligations. This doctrine was reaffirmed in Liverpool, etc., Steam Co. *vs.* Phœnix Insurance Company, 129 U. S., 397, on page 458 (petitioner cites this case as against us on this point), where it was said that, according to the great preponderance, if not uniform concurrence, of authority, the general rule was that the nature of the obligation and interpretation of the contract are to be governed by the law of the place where made, unless the parties at the time of making it have some other law in view. What law did the parties here have in view as determining the legal consequences resulting from the non-performance of the contract between them? Presumptively the law of England, where the contract was entirely to be performed."

Coghlan *vs.* S. C. R. R. Co., 142 U. S., 101, 109.

The following authorities sustain the above rule of law:

Phinney *vs.* Ins. Co., 67 Fed., 493.

Pritchard *vs.* Norton, 106 U. S., 124, 136.

Liverpool Steamship Co. *vs.* Ins. Co., 129 U. S., 397, 458.

Scudder *vs.* Bank, 91 U. S., 406, 411.

Bank of U. S. *vs.* Daniel, 12 Pet., 54.

Hall *vs.* Bruen, 1 How., 169.

Duncan *vs.* U. S., 7 Pet., 435.

Cox *vs.* U. S., 6 Pet., 172.

Boyce *vs.* Edwards, 4 Pet., 111, 123.

Lamar *vs.* Macou, 114 U. S., 218.

Watts *vs.* Connors, 115 U. S., 353, 362.

Scotland Co. *vs.* Hill, 132 U. S., 107, 117.
Dickerson *vs.* Edwards, 77 N. Y., 573, 578.
Pecks *vs.* Mayo, 14 U. T., 33, 38.
Arnold *vs.* Potter, 22 Iowa, 194, 198.
Griffith *vs.* Ins. Co., 101 Cal., 627, 641.
Griesemer *vs.* Ins. Co., 10 Wash., 202, 211.
Mass. Ins. Co. *vs.* Hale, 23 N. E. (Mass.), 849.
Story on Conflict of Laws, 8th ed., par. 280, p. 376, and long list of authorities.

In another case decided recently by this Court a contract had been actually made in the District of Columbia, but it was provided in the contract that it should be subject to the laws of Connecticut, just as the stipulation provide in this contract that it should be construed by the laws of New York. Chief Justice Fuller uses this language:

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars ($300) the amount of such excess shall inure to the benefit of the creditors of the person paying the premium."

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Wash. Bank *vs.* Hume, 128 U. S., 195, 206.

The supreme court of Iowa in a case decided but a few months ago, when this question was before it, used the following language:

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such

law as that above set forth in either of these States. The policy was signed by the president and secretary of the company in the city of New York. The premium was made payable there, and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that State. (Richards, Ins., 44.)"

Goodwin vs. Ins. Co. (Iowa), 66 N. W., 157, on p. 160.

The circuit court of appeals for the sixth circuit, in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every form a contract is governed by the law with a view to which it is made."

Penn. Ins. Co. *vs.* Savings Bank, 72 Fed., 413, on p. 418.

It is claimed that this Court, in the case of The Equitable Insurance *vs.* Clement, 140 U. S., has in reality reversed the above decisions, and held that a contract is to be construed by the laws where the contract is made, not where to be performed, even though in the case of Coghlan *vs.* R. R. Co., 142 U. S., quoted *supra*, this Court held directly with us, and they do attempt to distinguish between the Coghlan case and this, nor could they if they attempted to do so. It is very apparent that the Clement case can be distinguished from the cases already cited.

In the Clement case the insurance company accepted the privilege afforded it by the State of Missouri to do business in that State. By the law of Missouri an insurance company insuring a citizen of that State within its borders

could not forfeit but a portion the reserve on a policy after it had been in force two years.

The insurance company undertook to avoid this statute in two ways: First, by an express waiver of the statute by a clause in the policy. This Court held such clause void. In the second place, it made the place of the performance of the contract in New York, and claimed it had thus avoided this statute. This Court held against that contention. In other words, this Court held that the company could not, directly or indirectly, avoid the public policy of Missouri as established by statutes of that State. This Court, in another case already cited, recognized this exception. As already stated, parties in the District of Columbia entered into a contract of insurance with a Connecticut company. Though the contract was actually made in the District of Columbia, yet the place of the performance of the contract was Connecticut; hence a Connecticut contract. In that case this Court used this language:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of the contract as if incorporated therein, not only because they are taken as if entered into there, but because there is the place of performance, and the stipulation of the parties was made with reference to the laws of that place; 'and if it is so as between Hume and the Connecticut companies, then he could not at any time dispose of these policies without the consent of the beneficiary. *Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia.*'"

Washington Bank vs. Hume, 128 U. S., 195, on p. 207.

In other words, if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract Hartford, Connecticut, such provision of the contract would have been null and void. This makes the decision of the Supreme Court in 140 U. S. and 128 U. S. and other cases cited harmonize.

2. THIS LAW REQUIRING SERVICE OF NOTICE IS IN EFFECT AN AMENDMENT OF THE CHARTER OF INSURANCE COMPANIES CHARTERED BY NEW YORK AND CONTROLS THE MANNER OF FORFEITING A CONTRACT BY SUCH COMPANIES, NO MATTER WHERE THE CONTRACT IS MADE. THE COURT OF APPEALS OF NEW YORK HAS SO HELD.

It is not claimed, and could not be successfully, that the legislature could not compel companies chartered by it to serve notice on all policy-holders, regardless of where the contract was made; but it is claimed that such was not the meaning of the act. The one complete answer is that the court of appeals of New York has held that such was the meaning of the act.

One Carter was a resident and citizen of the State of Georgia. In 1870 the Brooklyn Insurance Company of New York issued a policy of insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case. This was six years before the enactment of the law requiring notices. In 1877, 1878, 1879, and 1880 Mr. Carter paid his renewal premiums in Georgia, so, according to the plaintiff in error's contention, the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion until it was paid at Georgia or place where the premium was actually paid. The appellate court of New York was compelled to pass upon the question whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute, and the opinion on this point is as follows:

"Upon this state of facts several questions arose upon the trial, among which the material ones are:

"First. Whether the law of 1876 requiring notices to be sent to the policy-holders applies to this policy." * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the

statute reqired. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

Carter vs. Life Ins. Co., 110 N. Y., 15 on p. 20.

See also Baxter *vs.* Ins. Co., 119 N. Y., 450, 454.

We earnestly ask the Court's attention to the whole of the above opinion. The legislature had the power to compel insurance companies to serve notice of maturity of premiums on all policy-holders. The highest court of New York has held that such was the meaning of this act. Then no other court will pretend to give the act any other meaning or construction. But this authority is not alone. The supreme court of California in a case subsequent in time followed the above decisions. The insurance company claimed the contract was a California contract, but the supreme court held that the statute was a limitation on the power of the corporation, and therefore was applicable. The court says:

"*It would seem, however, that the New York statute was intended to cut deeper*, and as a matter of public policy to inhibit forfeitures by life insurance companies except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires* and void. * * *

"A corporation, being the creature of the law, must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and if it can do it only in a given manner the prescribed method becomes the measure of its power."

Griffith *vs.* Ins. Co., 101 Cal., 627.

The civil court of appeals of Texas, construing this same statute, follows the above cases and states the rule unequivocally:

"The laws of New York would apply to contracts of insurance made by insurance companies chartered under its laws, whether the contracts were made in New York or any other States in the Union."

Manhattan Ins. Co. *vs.* Fields, 26 S. W. (Tex.), 280, 282.

The above cites as authority on this point Rue *vs.* Railway Co., 74 Tex., 553.

Each of the following authorities recognizes the rule we are contending for and enforces it:

Hebb *vs.* Ins. Co., 138 Pa. St., 174, 180.

Ins. Co. *vs.* Ficklin, 74 Md., 172, 180.

Relfe *vs.* Rundle, 103 U. S., 222, 226.

Canada So. R. R. Co. *vs.* Gebhart, 109 U. S., 527, 537.

II.

THIS STATUTE CANNOT BE WAIVED, BUT ITS TERMS MUST BE COMPLIED WITH.

There have been many attempts made by insurance companies to avoid this and kindred statutes. Sometimes it has been attempted by inserting in the policy, as in this, an express waiver of the statute. In other cases the attempt has been to make the place of contract outside of the State. The courts have uniformly held against such stipulation or device. In California, in a case already alluded to, the company (a New York company) tried both, but the court, in an opinion already cited, says:

"Admit that Griffith attempted to waive all notice of nonpayment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a

waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law. * * *

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith vs. New York Life Ins. Co., 101 Cal., 627, on pp. 641-'2.

This Court reached the same conclusion in another case, using this language:

The Court says:

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

Insurance Co. vs. Clemens, 140 U. S., 226 ,on p. 234.

Mr. Justice Brewer, of this Court, when sitting as circuit judge, expressed this proposition in very forcible language:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or

changed, a child can see it would protect only so far as the insurance companies were willing."

Wall *vs.* Ins. Co., 32 Fed., 273, 277.

To the same effect are each of the following cases:

Fidelity Ins. Co. *vs.* Ficklin., 74 Myd, 172, 185–'6.
Hermany *vs.* Ins. Co., 151 Penna., 17, 24.
Reilly *vs.* Ins. Co., 43 Wis., 449.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Emery *vs.* Ins. Co., 52 Me., 322.
White *vs.* Ins. Co., 4 Dill., 177.

III.

THE SECOND PREMIUM WAS TENDERED BY MR. PHINNEY PRIOR TO HIS DEATH.

We have already shown that the agent wrote the company the time the second premium was due that Mr. Phinney had "offered to pay his premium" (Record, p. 187). Immediately following this the company instructed the agents not to accept his premium if tendered. Again the agent wrote the company:

"DEAR SIR: Your wire of the 9th inst. reading, 'If tendered decline acceptance September premium No. 422,198, Phinney,' duly received.

"*This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.*

"Yours very truly, F. L. STINSON."

In plain English this meant he was a dying man and the company wanted to terminate the policy. Having made one tender, no other or subsequent tender was necessary. The company had elected to take that position, and it cannot retreat from it.

IV.

UNDER THIS STATUTE OF NEW YORK THE TENDER OF A PREMIUM IS NOT NECESSARY UNTIL THE STATUTORY NOTICE IS SERVED.

The question of the tender of a premium upon a contract of insurance under this statute was before the appellate court in New York, and it was there held that it was not a necessary preliminary prior to commencing the action. This was the only question before the court in that case. We can do no better than to quote a part of the opinion in that case:

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy.* The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred."

Baxter *vs.* Ins. Co., 119 N. Y., 450, 456–'7.

This decision is followed by another decision in the same court, in part as follows:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the de-

fendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece vs. Insurance Co., 136 N. Y., 144, on p. 151.

The supreme court of Washington, where this case arose, said it was incumbent upon it to follow the above decision, being the construction of a statute of New York by the highest court of New York.

Griesemer *vs.* Ins. Co., 10 Wash., 202, 211.

V.

NO TENDER OF PREMIUM WAS NECESSARY, BECAUSE THE COMPANY HAD DENIED LIABILITY ON THE CONTRACT.

As we have already shown, the petitioner had refused the tender of the premium by Mr. Phinney during his lifetime. When defendant in error offered proofs of death of Mr. Phinney, the company denied all liability on the contract. The company, having taken that attitude, cannot be heard to say that we ought to have tendered a payment on a contract which it was repudiating. Does the company mean to say that it was not acting in good faith, and that it would have taken the premium? It is an old maxim of the law that no court will compel a party to do an utterly useless act.

The supreme court of Washington, in a case exactly identical with this, cited *supra*, Griesemer *vs.* The Mutual Life Insurance Company of New York (this same plaintiff in error), has held the foregoing to be the law. The opinion is by Mr. Justice Hoyt, as follows:

"The appellant alleges one other reason for the reversal of the judgment, which it is necessary for us to consider. It was not made to appear from the record that there had ever

been any tender of the premium which became due before the death of the assured; and it is contended that, since the payment of the premium was a condition precedent to the policy being kept in force, no action could be maintained thereon until such condition had been complied with by some one claiming under the policy. This contention is founded upon the well-settled legal proposition that an action cannot be maintained upon a contract by one party unless he has complied or offered to comply with all the conditions on his part to be performed. There is, however, a well-settled exception to this rule when it relates to the question of tender of money, and that is that whenever it clearly appears that the tender, if made, would not have been accepted, the contract may be enforced without such tender; and, in our opinion, the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death that the company entered upon the investigation of the rights of the claimant under the policy, and held that they were terminated by the non-payment of the premium; and we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium."

Griesemer vs. Mutual Life Insurance Co., 10 Wash., 202, on p. 210.

Griesemer, admx., vs. Mutual Life Insurance Co., 10 Wash., 211.

It is thus seen that the highest court, both of Washington and New York, has held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case, and upon which she could rest with absolute confidence, one bing the law of the place of contract, the other the law of the forum. This plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on

a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well. Further than this, the decisions of both States are in entire harmony with numerous other courts, among them the following: United States *vs.* Peck, 102 U. S., 64; Lawrence *vs.* Miller, 86 N. Y., 131, on pp. 136–'7; Equitable Insurance Co. *vs.* Vining, 7 C. C. A., 359; Insurance Co. *vs.* Smith, 5 N. E., 417 (Ohio State).

DEFENDANT IN ERROR DID PROVE HER ACTION AS ALLEGED.

Defendant in error alleged that the insured duly performed all the conditions of the contract by him to be performed.

This she proved. The payment of the first year's premium was admitted by defendant in error. No second premium was due and payable until the statutory notice was served. It was not necessary to prove the payment of any other premium until the defendant had proved that it had served the statutory notice, which it failed to do. In our pleading we follow the cases of Baxter *vs.* Insurance Co., 119 N. Y., 450; De Frace *vs.* Insurance Co., 136 N. Y., 144, and the cases of Griesemer *vs.* Insurance Co., 10 Wash., 202, also 212, cited above, and for the reasons therein stated we were safe in doing so.

VI.

THIS STATUTE IS NOT A PENAL ONE.

It is unnecessary to argue this proposition. There is nothing about the statute that can be called penal in any sense of the word. It simply provides that a penalty of forfeiture of a contract shall not occur without timely warning and notice, and preserves the contracts of the parties intact until such notice is served.

VII.

MEANING OF THE STATUTE.

Petitioner goes into a discussion of the meaning of the statute. We think it means just what it says. No court has had any trouble about finding out its true meaning. It says no policy of insurance shall be forfeited until a prescribed notice shall be served at least thirty days before a forfeiture can be declared.

The appellate court of New York and many other courts have held that that is just what it means, and that a policy of insurance is a binding contract until it is terminated by the notice. This petitioner ignored the statute altogether. It took the position it did not need to comply with law. (See Record, p. 192.)

Petitioner quotes from a decision of this Court to the effect that an insurance company must have the power to cut off unprofitable members. It has it under this statute. It can serve the statutory notice any day after the due date of a premium, and thus forfeit the contract.

The contention of petitioner that this statute was only intended to preserve the reserve to a policy-holder shows to what straits they are driven to find something to base an error on.

One complete answer to this is, the statute does not read that way. Another complete answer is that the legislature of New York has enacted another law for the express purpose of preserving the reserve on each policy to the policy-holder. It provides when and how the policy-holder shall have this reserve, what share shall be forfeited to the insurance company, and what share shall be preserved to the policy-holder.

It has passed another law requiring assessment companies and mutual benefit associations to serve certain

notices, similar to the notice provided by this statute, on their policy-holders. In such societies there is no reserve. How are those societies to dodge that statute? This argument of petitioner will be unavailing. All courts that have enforced this statute before them have enforced it strictly, believing it to be a good law for the protection of the insured.

Conclusion.

In our brief we have shown at least three reasons why the application for a writ should be denied:

1. In the first place, the dismissal of the writ of error raises no question of grave public importance or one in which there is a conflict in the decisions of the various courts.

2. In the second place, the circuit court of appeals correctly decided that the writ should be dismissed. If no error is to be corrected no writ should issue.

3. In the third place, even though this Court should be of the opinion that the dismissal of the writ raised a question of sufficient importance to give this Court the right to issue the writ, and even though this Court further was of the opinion that the lower court committed error in dismissing the writ, yet from the discussion of the merits, which petitioner invited, the court will find that the judgment of the circuit court was right and must be affirmed if ever heard on its merits. Then what good may come from prolonging the case? Would it not be doing respondent a great wrong and injustice, and petitioner as well, to put her to the great cost of maintaining this struggle for months, and, possibly, two or three years, when no other result can be reached? This, too, when she has already been to the expense of litigating this case to the Court of last resort as

determined by the act establishing the circuit court of appeals. It may be that petitioner, with its millions of assets, can easily afford to litigate the matter further, as litigation is an important part of its business; but not so with this respondent, a widow left with an involved estate on her hands to struggle through it all as best she may.

In addition to all this, the equities of the case are with us. The insured paid his first premium and tendered the second, which the company refused to take, because it had its finger upon insured's pulse, and it was beating slow and weak.

This premium, with interest, was deducted from the amount defendant in error would otherwise have recovered.

The petitioner was trying to forfeit his contract to escape the payments of its loss. The agent said, in a letter written at the time he refused to take his premium: "He is now a very bad risk." The inspector, writing at about the same time, reports: "He is growing fat and flabby; is drinking not enough to get drunk, but enough to ruin his health." Without right, contrary to the law of New York, it declared his policy forfeited. What does the company mean when it says he did not tender his premium? Did it think respondent would neglect to call the court's attention to the record? Why should it complain about not receiving a premium it refused to take; about failing to receive a premium that it telegraphed its agent across the continent not to take under any circumstances? And the agent triumphantly answers he has already refused to take it.

The company was much alarmed lest the agent would overlook the fact that Mr. Phinney was a bad risk, and might give a few hours grace to save the forfeiture of his policy of insurance, which Mr. Phinney prized highly. His application for more insurance had just been denied on account of his condition, and he was very anxious to keep this policy in force. "Forfeitures are odious; they are often the

means of great injustice and oppression," and courts will only enforce them when necessary.

It would have been a rank injustice had the company accomplished its object in forfeiting this contract; but in its zeal and hurry to forfeit the contract it overstepped itself and failed to comply with the New York statute, which was intended to accomplish this very object—prevent a forfeiture without timely notice and warning.

For these reasons we submit that the application should be denied.

Respectfully submitted.

S. WARBURTON,
Attorney for Respondent and Defendant in Error

A. T. BURLEIGH,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

Brief of Defendant in Error, on Motion to Quash and Dismiss Writ of Error.

LORENZO S. B. SAWYER,
Counsel for the Defendant in Error for the purposes of the motions.

S. WARBURTON AND A. F. BURLEIGH,
Of Counsel for Defendant in Error.

Houghton Printing Co.

United States Circuit Court of Appeals

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THE MUTUAL LIFE INSURANCE COMPANY of New York,
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NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

To Edward Lyman Short, Strudwick & Peters, Stratton, Lewis & Gilman, Esquires,
Counsel for Plaintiff in Error.

PLEASE TAKE NOTICE, that on Monday the 4th day of May, 1896, at the opening of the court, or as soon thereafter as counsel can be heard, at the court room of said court, in the City and County of San Francisco, State of California, the motions of which the foregoing are copies will be argued and submitted to the United States Circuit Court of Appeals for the Ninth Circuit, for the decision of the said court thereon.

LORENZO S. B. SAWYER,
Counsel for the Defendant in Error for the purposes of the motions.

S. WARBURTON AND A. F. BURLEIGH,
Counsel for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

Comes now the defendant in error, by her counsel appearing in that behalf, and moves the court to dismiss or quash the writ of error in the above entitled cause for manifest manifold irregularities and informalities in the papers and proceedings in error, viz, because:—

1. There is no technical nor proper return to said writ of error.

2. Neither the petition for writ of error, nor the assignment of errors, nor the order granting writ of error and fixing amount of bond, nor the bond upon said writ of error, nor the citation upon said writ of error, was filed with the clerk of the court below.

And the said defendant in error by counsel as aforesaid, also moves the court to dismiss or quash the writ of error in

the above entitled cause for want of jurisdiction, because:—

1. No proper or legal citation on said writ of error was issued or served; and

2. Said writ of error was not filed in the court below.

This motion will be made upon the record herein.

LORENZO S. B. SAWYER,
Counsel for Defendant in Error for the purposes of these motions.

S. WARBURTON and A. F. BURLEIGH,
Counsel for Defendant in Error.

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BRIEF OF ARGUMENT ON MOTION TO DISMISS OR QUASH WRIT OF ERROR.

1. *No technical return to writ of error.*

It is manifest from a mere inspection of the original writ of error which accompanies the transcript of the record herein that there is no formal nor legal return to the writ. Every writ of whatsoever kind, ought when returned, to have endorsed upon it a return: that is, a short account in writing of the manner in which it has been executed. Stephen on Pleading, star page 21. It is not enough that a writ is executed, or even that a party is served with a summons or subpœna; the endorsement upon the return writ should show what has been done, or left undone, in the premises. So in this case, the tsanscript certified by the clerk of the lower court is only the clerk's return to the said writ under the rules in that regard, and not

the return of the judges of the court to whom the writ of error was directed (see writ), and there should, besides, have been some such endorsement as this upon this writ:

"The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of Washington:

"The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the Court: .....

(SEAL.) Clerk."

And this endorsement, like the certificate at the end of the transcript, should have been authenticated by the signature of the clerk and the seal of the lower court. Even a commission to take testimony, or dedimus, besides being returned with the testimony properly certified by the person to whom it is directed, should have endorsed upon it some such return as the following:

"In pursuance of the command of the within commission, I (or we) have executed the same, as will appear by the schedule of testimony, hereto attached and returned herewith.

.....

Commissioner."

Which return should be signed by the commissioner.

We cite no authorities to this point because the immemorial, universal and unexceptionable rules and practice of all courts with regard to all writs seem a sufficient support. It needs no other.

This writ is not a creature of our statute, but an old, old mother (and mother-in-law) country writ, and when we adopted it in 1789, we adopted the practice concerning it, except in so far as the same has been modified by United States statutes or the rules of the United States Courts. These being silent upon the subject of this technical and formal return, the old practice, of course, obtains.

"All provisions of law should be construed with reference to the hitherto existing law and practice in such cases. There can be no presumption that Congress intended to change the practice, unless that intention is plainly manifested by the language of the act." Stevens vs. Clark, 62 Fed., 321, *322*. This court might, perhaps, under the second section of the act of its foundation, have prescribed "the form of writs and other process and procedure;" but, instead of doing so, it has adopted the practice of the Supreme Court of the United States "as far as the same shall be applicable" (C. C. A. Rule 8), and the very act establishing this court has extended over it and over appeals to and writs of error from it, "all provisions of law now in force regulating the methods and system of review through appeals or writs of error" (Act March 3, 1891, Sec. 11).

The form of the writ of error was in 1792 devised by the justices of the Supreme Court of the United States and by the clerk of the said Supreme Court transmitted to the clerks of the United States Circuit Courts, and under that act of 1792 (R. S. Sec. 1004), it may issue either from the appellate court, or from the office of the clerk of the court where the record remains which rendered the judgment. The writ of error is the writ of the appellate court although issued by the clerk of the lower court (Mussina vs Cavazos, 6 Wall., 355), and a clerk of the lower court has no right to change its form without consent of the Supreme Court justices. Barton vs. Forsyth, 5 Wall., 590.

It is almost as impossible to conceive of a writ returned without a formal return, as it is to conceive of a court, without the necessary formalities of a court. No authority that we can find does away with the necessity of this formal return. In the case of Blitz vs. Brown, 7 Wall., 693, the writ of error was dismissed because the certificate of authentification of the transcript was without the seal of the court below or the signature of the clerk, both being held to be requisite and necessary. The celebrated cases of Martin vs. Hunter, 1 Wheat., 304, *361*, and Worcester vs. Georgia, 6 Pet., 515, *536*, *537*, *565*, *566*, hold, among other things, that under the rule concerning "writ of error, return and record," it is not necessary that the record should be certified by the *judge* who held the court. That the signature of the clerk and the seal of the lower court were sufficient: the latter case citing the case of Stewart vs. Ingle, 9 Wheat., 526, wherein it was held that a return made by the clerk of the court to which it was addressed was a sufficient return to a writ of certiorari, a writ very like the writ of error. A writ of error partakes of the nature of a writ of certiorari which removes a record from an inferior to a superior court, and that of a commission to the judges of such superior court to examine the record and affirm or reverse the judgment therein according to law. Co. Lit. 288 b. and 2 Bac. Abr. 187 It is, of course, natural and proper that when a writ is directed to a court or to the judges thereof, and concerns a record of that court, the ministerial officer of that court who has the custody of the records of that court should make and sign whatever is necessary in the way of return to the writ. But why should not the clerk, besides signing and sealing a certificate to the transcript, also sign and seal a brief account of what he has done in the premises by way of endorsement upon the writ? The properly authenticated transcript is the substance of the return to a writ of error or certiorari, just as the money

made upon an execution is the substance of a return to the writ of execution; but neither the clerk nor marshal (or sheriff) is thereby relieved from the duty of endorsing upon the writ executed a brief account of the manner in which he executed it.

If it be said that this practice has not always prevailed; that this technical and formal return is sometimes omitted; we ask is it not high time, then, to return to and insist upon the proper and better practice. In the case of Villabolos vs. United States, 6 How. 81, *89*, Chief Justice Taney held that a citation signed by the clerk instead of the judge of the lower court could not bring a party into the Supreme Court or give it jurisdiction; although he found upon examination of the Supreme Court records that in all of the former cases from the same state from which the case in hand came, the citation was signed by the clerk. And says the court, "If there are any cases like the present in which this court has treated the appeal as valid, they must have passed *sub silentio* and without having attracted in this respect, the attention of the court." So counsel might find among the records of this court, several cases from the State of Washington, and perhaps from other states, in which this technical return has been omitted, which yet would not justify the omission. And so too in the case of Worcester vs. Georgia, *supra*, 565-6, the Supreme court after an examination of the records to ascertain the practice with regard to the authentification of transcripts on error, found fifteen cases wherein the records were certified by the court or the presiding judge; and yet held that it was the *better practice* for the clerk, instead of the judge, to certify the transcript, and that the clerk's certificate was sufficient.

When even so important a question as the jurisdiction of the court, as in Wales vs. Whitney, 114, U. S, 564-5, does not

appear to have been contested, the Supreme Court does not consider itself bound by the views expressed. Cross vs. Burke, 146 U. S., 82. Although it is an appellate court's first duty to determine the question of its own jurisdiction and then the jurisdiction of the court below, no court goes out of its way to determine questions not raised.

This point, as well as some others that we make upon this motion, may to some seem small ; but law, like life, is made up of small things, and neither good form nor small things are to be despised. Some of our points are jurisdictional, and surely nothing jurisdictional can be called trivial. 'It is dangerous to alter old established forms." This doctrine is so sound and important that it has been crystalized into the well known maxim *via antiqua via est tuta* Form is frequently so closely allied to substance, that it cannot be separated from it. For instance, Chief Justice Marshall in the case of Cohens vs. Virginia, 6 Wheat. 264, *411*, says, "An appeal might be given and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form not substance." Yet the Supreme Court itself says in the case of Murdock vs. City of Memphis, 20 Wall, 590-642, "We dismiss every day cases brought here by writ of error to a circuit court because they can only be brought here by appeal," citing the San Pedro, 2 Wheat. 132 ; McCollum vs. Eager, 2 How., 61 ; and Miner vs. Tillotson Id. 392, "The question may perhaps seem to be rather one of form than of substance, but nevertheless it is our duty to conform to the acts of congress, and we cannot exercise the appellate jursdiction conferred upon this court, except in the form prescribed by law." Parrish vs. Ellis, 16 Pet. 451. And again (about the briefest decision of the Supreme Court found in the reports), "This action was dismissed because brought here by appeal instead of writ of error." Bevins vs. Ramsey, 11 How., 185. So it seems that although the mode of remo-

val is form not substance, the adoption *of any mode but the right one* will surely bring about a summary dismissal of the case. This is only one instance out of many which shows that mere form and not substance will serve to make or mar the fortunes of a case. As manners make the man, so form frequently makes the substance, or, at least, the substance cannot get along without its appropriate form. You may have ever so good a case, one in which justice and equity join hands, but if your pleadings, process and proceedings are not correct in form as well as in substance, you will certainly lose your case.

II.

NEITHER THE PETITION FOR THE WRIT OF ERROR, NOR THE ASSIGNMENT OF ERRORS, NOR THE ORDER GRANTING THE WRIT OF ERROR, NOR THE BOND UPON SAID WRIT OF ERROR, NOR THE CITATION THEREON WAS FILED WITH THE CLERK OF THE COURT BELOW.

Under this second head of our motion to dismiss or quash this writ of error for manifest irregularities and informalities, we have, in the interest of brevity, joined several grounds, *upon every one of which grounds, courts have dismissed such writs.* As to the necessity of filing the petition for the writ of error and the assignment of errors, the rule of this court is explicit.

"Rule 11. The plaintiff in error, or appellant, *shall file with the clerk of the court below*, with his petition for the writ of error or appeal, an assignment of errors, etc.," and a little further on, "No writ of error or appeal shall be allowed until *such assignment of error shall have been filed.*" The Supreme Court of the United States has a similar rule which would govern this court under the 8th rule of this court, if this court had not a rule of its own. This court has, under the second section of the act creating it, already alluded to, "the power to

establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law ;" and its rules within and, in pursuance of the law have the force and effect of law. "A rule established by the Supreme Court of the United States, in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself * * * and substantially a law of the United States." Seymour vs. Phillips & Colby Co., 7 Bissell, 460 465. And what is true of the Supreme Court's rules, is also, under this second section of the law, true of this court's rules. If this court had no rule on this subject the eleventh section of the act would cover the ground and enforce the same laws and practice which this court has in and by its eighth rule adopted.

It is not denied that a court can alter or suspend its *own* rules when justice demands it, but rules were certainly made to expediate business. Says Mr. Justice Blatchford in Richardson vs. Green, 130 U. S., 104 (9 S. C. R. 443, *445*,) "All suitors in this court are bound by its written rules, and its practice and decisions are established and known." "Rules were made to be enforced and observed." Van Gunden vs. Va. C. & I. Co., 52 Fed. (C. C. A.) 838, *841*, citing Deitsch vs. Wiggins, 15 Wall, 539; R. Co. vs. Mulligan, 67 Fed. (C. C. A.) 569; Vider vs. O'Brien, 62 Fed. 326; Sutherland vs Brace, 71 Fed. (C. C. A) 469, *472* In the last case, says the court, "If the practice thereby (Rule 11, C. C. A.) be deemed onerous and the rule declared, ought to be rescinded, it can more certainly be done by strict adherence to the decision (R. Co. vs. Mulligan, *supra*) than by ignoring it." In Deitsch vs. Wiggins, *supra*, Mr. Justice Strong said, "Most of the assignments of error have been made in total disregard of the twenty-first rule of this court. That rule is necessary to the disposition of the business which presses upon us and it is our intention hereafter to enforce strict compliance with its demands,

etc." Says the court in Warner vs. T. & P. Ry. Co., 54 Fed. (C. C. A.) 920, *922*, "It is well to proceed in order; and in a matter of general usage so long established parties could not complain if some strictness should be exercised in enforcing compliance with prescribed forms." In the Mutual Life Insurance Company vs. Conoley, 63 Fed. (C. C. A.) 180, *1* and *2*, the court below allowed an appeal although the case was a law case, and in order allowing it granted the defendant below thirty days in which to file assignments of error which were filed within the time granted; but the Circuit Court of Appeals says, "It is plain that this court cannot consider the errors so assigned if it regards and is governed by its rule as cited (Rule 11, C. C. A.) We have had occasion several times heretofore to request attention to the rules applicable to the questions now under consideration, and to the necessity for a strict adherence to the mode of procedure designated by them. We now do so once more indulging the hope that no occasion will arise in the future requiring us to refer to them again in this connection. (citing) Van Gunden vs. Iron Co., *supra*, Improvement Co. vs. Frari, 58 Fed. (C. C. A.) 171. * * * We feel compelled to enforce the provisions of the rules and the requirements of the practice alluded to, and to again announce that *this court*, in order to secure uniformity in the proceedings of the circuit and district courts, as well as in its own, will hereafter *insist* upon a strict compliance with the same ; and we do this in the present case the more readily for the reason that its record shows that no substantial error was committed by the court below, and that consequently no injustice will in fact be done to the parties thereby, while much good may result therefrom we hope." In the State of Florida vs. C. H. Phos. Co., 70 Fed. (C. C. A.) 883, *886*, the court says, "The rules of the court although directory, were made to be observed and our patience is tried with application for relief where counsel have

utterly ignored and disregarded their plain requirements. An observance of the rules preserves the rights of the parties and facilitates the business of the courts. Disregard of them not only injuriously affects the rights of the parties but delays and embarrasses the court to the hindrance of other causes."

The case of Jones vs. Mann, 72 Fed., 85, only holds that the appellant while complying with rule 11 of the Circuit Court of Appeals had put it out of his power to comply with rules 23 and 24 of said court, and therefore could not be punished for non-compliance with the later rules. That is all there is to that case.

But if authorities, in addition to rules and practice, were needed, there are plenty of them. The Circuit Court of Appeals in United States vs. Goodrich, 54 Fed., (C. C. A.) 21, the first case which arose under the eleventh rule of the Circuit Court of Appeals, announced that it would enforce this rule to the letter and concludes, "The result is that this court will not consider errors, the assignment of which is not made and *filed in the court below*, when the appeal or writ of error is allowed. The writ of error is accordingly dismissed." Being the first case of the kind in this court the court did examine the record in the case and found no substantial error in it. If this court should deem it necessary to examine this record of ours, it would find no error in it. The case of the U. P. R. R. Co. vs. the C. E. R. Co., Id. 22, is of the same tenor and effect and concludes "The judgmect below is affirmed." A failure to file an assignment of errors in the court below is a good ground for dismissal. Durfour vs. Lang, 54 Fed. (C. C. A.) 913. As to the necessity of filing the order allowing writ, the bond upon writ and the citation thereon, although the law and the rules are silent, the books are full of precepts for it and cases recognizing it. See all works on practice in United States Courts including Mr. Jus-

tice Curtis' Practical Directions for suing out and prosecuting writs of error and appeals to the Supreme Court of the United States. Is it not a universal rule of every court, that every paper belonging to any case in that court should be filed in that case and court? There needs no rule to require the filing of such papers. It is the unwritten rule or law of every court, a corollary of that great law for the conduct of life as well as for the obtaining of suits. "*Let all things be done decently and in order.*" "As in this case the petition, order and bond were not filed in the Circuit Court, etc., (until too late), the cross-appeal must be dismissed." Churchill vs. Farrar, 135 U. S. 609 (10 S. C. R. 771, 772). "*An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is in some way presented to the court which made the decree appealed* from thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done BY FILING THE PAPERS, viz: the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond and the citation." *Nor can these papers be filed nunc pro tunc. No order nunc pro tunc is allowable in such a case.* "If it could be, the law which limits the time within which an appeal can be taken" (or writ of error sued out) "would be a dead letter." Credit Co. vs. Ry. Co., 128 U. S. 258 (9 S. C. R. 107). "The petition and bond have not been filed or presented even at this late day." Threadgill vs. Platt, 71 Fed. 1.

But it may be urged that admitting the necessity of the filing of these documents, it does not follow that they were not filed merely because they were not endorsed "filed" by the clerk of the court below.

What constitutes filing a paper? Burrill's Law Dictionary thus defines it:

"*Delivering the paper (endorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it* 'FILED,' *adding the date, and deposits it, under the proper head among the papers, or files, in his office.*"

This is substantially the definition of filing found in all the law and other dictionaries. Some of them like Burrill's, Black's, Webster's International, and the Standard Dictionary, give a double definition. "*To 'file' a paper on the part of a party, is to place it in the official custody of the clerk. To 'file' on the part of the clerk is to endorse upon the paper the date of its reception, and retain it in his office subject to inspection by whomsoever it may concern.*' We, of course, maintain that THE ACT OF FILING HATH THESE TWO BRANCHES AND THAT THE FULL AND PROPER DEFINITION OF FILING EMBRACES THEM BOTH. If authority is needed we have it. Foster in his work on federal practice, says: "*No paper is considered filed unless it has the proper endorsement by the clerk.*" 1 Foster, Fed. Prac. 598.

"*No paper is filed unless it has the proper endorsement of the clerk, merely placing it in the court papers is no filing.* A promissory note or bond upon which suit is brought, though introduced in evidence, is not filed and can be withdrawn. 'Tis not considered '*received and filed*,' nor is it entered in the court calendar." Amy vs. Shelby Co., 1 Flippin, 104 (C. C. 6 C. Aug. 7, 1872.)

"In regard to filing the orders to pay to which the signature of the judge is attached, SUCH PAPERS BELONG TO THE FILES OF THE COURT AND SHOULD BE MARKED 'FILED' BY THE CLERK FOR IDENTIFICATION." Erwin vs. U. S., 37 Fed. 470, *484*.

Almost every case concerning clerk's fees in United

States Courts involves this question and necessitates this interpretation of the definition of the word "filing."

'Tis matter of common knowledge that rules and regulations of the Department of Justice requiring certain papers, reports and vouchers, to be filed, require them to be marked or endorsed *filed*. If every paper or thing, left in the custody of the clerk, or in the clerk's office, were considered filed whether marked "filed," or entered in the register as "filed," or not; the clerk's responsibilities would be very much enlarged, and persons would be afraid to leave anything at the clerk's office. The bare statement of "such a state of things" shows its absurdity. A clerk frequently receives a paper or document and keeps it to be filed when his fees are paid, and it is generally considered that he has a perfect right to do this.

Even if "depositing in the proper office" were "filing" in English practice, our law and practice have changed that (Brooks vs. Norris, 11 How. 204-208) and our federal courts are governed by their own laws and their own practice. But, if we may judge from the defination of filing a bill in chancery given by Daniel in his work on chancery practice, English practice is very like our own in this respect.

"Bill in chancery—how filed."

"*The clerk of records and writs dates it the day that it is brought into his office, numbers it, and receives it into his custody*, the bill is then said to be *filed* and of record, but *before this process is completed, it is not of any effect in court*, and persons to be made parties have no right to take copies of it." Dan. Chan. 2nd Am. Ed. 468-9, Star paging 454. Of course there may be found some loose definitions of filing scattered through the books, but they serve only as exceptions to prove the proper definition of the term.

In Iturbide's Executors vs. United States, 22 Howard,

290, a statute requiring the *filing* of a bond is held to be mandatory.

An order denying a motion for a new trial signed by the judge *does not become effective until filed of record in the clerk's office.* Danielson vs. Fuel Co., 55 Fed., 49.

The decisions of the state courts though not authoritative upon this question in this court, are, on the whole, in line with those already given.

The leading case on this subject in this State is Tregambo vs. Comanche M. & M. Co., 57 Cal. 501, which gives only the partial definition of filing. It defines filing on the part of the party or attorney only. "In this state a paper is deemed filed when delivered to the clerk and the clerk's fees paid if demanded." We do not dispute this definition as far as it goes. We only claim that it does not cover the ground. Smith vs. Biscailuz, 83 Cal. 539, holds that "It is premature to enter the default of a defendant whose demurrer is on file undisposed of although the demurrer has not for want of fees paid been endorsed filed. 'Tis an old rule, and it was the rule of that court, that demurrers *interposed* should be disposed of before the case could be tried on its merits.

In Howell vs. Slauson, 83 Cal. 544, 'tis held that a list endorsed "list No. 1 Received and filed December 5, 1870," was (of course) filed.

In the case of Holman vs. Chevallier, 14 Tex. 339, a state statute allowed an execution to issue on a judgment after the death of the plaintiff, upon an affidavit of death entered of record or filed with the clerk, together with a certificate of appointment of a legal representative of the deceased plaintiff. There was no doubt that the state law had been sufficiently complied with The presumption in favor of all judgments which cannot be collaterally attacked was also invoked in this

case. The case of Turner vs. State, 41 Tex. 549, referred to in a note to a late edition of Texas Reports in connection with the last case, holds that the omission of a file-mark upon a bail bond would not affect the liability of the obligors on the bond. Of course not.

All the other State Court cases which we have examined, and we have endeavored to examine them all, are all strong in our favor, except perhaps a few that follow some particular provisions of State statutes, and so would not apply to our case. Pfirman vs. Henkel, 1 Bradw. (I 11 App.) 145; Peterson vs. Taylor, 15 Georgia 483 (60 Am. Dec. 705).

Powers vs. State, 87 Ind., 144, 148, arose under a State statute which only required papers to be deposited in the clerk's office, and besides, it was held that the objection to the want of filemark came too late after trial and conviction. The case of Johnson vs. Crawfordsville 11 Ind. 284 arose under a State statute which made a certified copy of articles of incorporation legal evidence, so that the question of filing or filemark cut no figure in the case. Naylor vs. Moody, 2 Blackf. (Ind.) 247, held that under a State statute requiring letters testamentary to be recorded, filing them was not a compliance with the statute.

Under a statute requiring an original document, or a copy thereof, to be filed with the pleadings, it was held that the act was complied with when the document was set out in haec verba in the pleadings. (Of course.) "The mere leaving with the clerk not sufficient unless the purpose of so leaving stated and not left to inference." Lamson vs. Falls, 6 Ind., 309. In Engleman vs. State, 2 Ind., 91, a defendant appeared, pleaded to an indictment, entered into a recognizance for his subsequent appearance, applied for and obtained a change of venue, was tried and convicted, after all which he objected in an appellate court that the indictment had not been properly filed.

It was held not that the endorsement was not necessary but that the objection came too late.

"*Filing signifies more than mere endorsement to that effect*, and comprehends entries made by the clerk on the record." Johnson vs. Hodges, 65 Mo., 589.

In Shore vs. Larsen, 22 Wis., 137-8, a mortgage duly received for record having time when received endorsed upon it held (of course), duly filed. In Smith vs. Waggoner, 50 Wis., 155, *160*, it is held "the filing *and endorsement* are the *principal things to be done*. Entries in the book not essential" See also to same effect Marlet vs. Hinman, 45 N. W., (Wis.) 953.

"Plaintiff cannot contradict clerk's record and show that the certificate was received to be *filed* and not to be *recorded*." Chapin vs. Kingsbury, 138 Mass., 194. Recording not compliance with statute requiring "*filing*." Chapin vs. Kingsbury, 135 Mass., 580. "Clerk's certificate endorsed on instrument is conclusive that it was recorded at the time named therein." Fuller vs. Cunningham, 105 Mass., 442; Tracy vs. Jenks, 15 Pick., 465; Jordan vs. Farnsworth, 15 Gray, 517. Under a statute not requiring endorsement a paper left in the safe at a clerk's house and office held filed. Reed vs. Acton, 120 Mass., 130.

Held mortgage not filed for record until instructions given to record, and then, antedating filing to date of actual delivery of paper to officer, of no effect. Deadman, vs. Earle, 52 Ark., 164: Citing Brown vs Fassett, 37 Ark., 507. In last case held mortgage not filed through endorsed filed, the words "for record" being erased.

A chattel mortgage was endorsed by a person who had charge of the town clerk's office, "Filed October 20, 1845," and placed among chattel mortgages in the office: Held this

was a filing Bishop vs. Cook, 13 Barb. 326 ; Dodge vs. Potter, 18 Barb., 193.

"*Filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing it, and the making of the appropriate endorsement by the officer.*" Phillips vs. Beene's Adr., 38 Ala. 248.

A warrant deputizing an under sheriff filed with the clerk need not be endorsed to make it valid. (Of course not.) Haines vs. Lindsay, 4 Ohio, 88.

All pleadings should be endorsed by the clerk when filed but party deemed to have waived his right to object on that account, after plea, verdict or judgment. Fanning vs. Fly, 2 Coldw. (Tenn.) 486.

"*Filing imports more than a mere reception into the custody of the clerk of the Court; his endorsement is necessary. Pinders vs. Yager, 29 Iowa, 468.*

Under State statutes curing every conceivable defect in legal papers endorsement would not, of course, be necessary.

Rex vs. Wade, 1 B. & A., 861, gives definition of filing on the part of a party or attorney. Only *quaers* as to whether filing is good without endorsement.

A paper is not filed until it reaches place of final custody. Not when it first comes into the hands of the officer of the court. Garlick vs. Sangster, 9 Bing. 46.

But it may be claimed that all the papers involved in this motion were properly endorsed by the clerk of the court below, and that he omitted to copy (or have copied) the endorsements into the transcript of the record which was sent up. And in this connection it may be said that he will be presumed to have done his duty.

Our complete answer to this is, that if he properly endorsed those papers, "it doth not appear" in the transcript and it certainly ought so to appear, and the presumption as to official duty, is, to use a common expression, "as long as it is broad," and would cover his duty to incorporate the endorsements into the transcript as well as his duty to make them. Most of the other papers in the cause were properly and regularly filed and we find those file marks in the duly certified transcript as a part of it. Would the clerk in copying or comparing for certification, have copied and certified the file marks upon SOME, *and omitted to copy or certify the same (if there were any) upon others?* "A question not to be asked." No; the truth and the fact is that the clerk of the court below was not requested to file these papers before the transcript was made and sent up. We had the records of the lower court searched after the transcript came here *and there was no file mark on them then, nor were they entered in the register as "filed." If these papers are now properly endorsed and entered, it was an afterthought done either with, or without the order of the court or judge, and cannot affect us. The clerk has no authority to change the file mark on papers filed by him. Warner vs. T. & P. R. Co., 54 Fed., (C. C. A.) 920, 921, and, of course, no authority to file papers which he is not ordered or requested to file. Even if the clerk of the court below could, by a nunc pro tunc order of court file all the other papers which counsel have neglected to have filed, which, under the authority of the Credit Co. vs. R. Co. supra, we most emphactically deny; yet, this procedure could not apply or be applied to the* ORIGNAL *citation and writ of error which came up with the transcript and are beyond the control of the clerk of the lower court or even of the lower court itself.* These, at least, are secure. *We stand upon our record. The transcript af the record, like every record, and especially these original papers, imports verity.*

What says the Supreme Court, Chief Justice Taney

speaking for the court, "*Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the Circuit Court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court.*" Hudgins vs. Kemp, 18 How. 530, *534*. The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do. "The fact that the clerk of the Circuit court in preparing transcripts on appeal to this court, labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules." Richardson vs. Green, 130 U. S., 104 (9 S. C. R. 443). *And this court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record.* Reed vs. Marsh, 13 Pet. 153; Fisher vs. Cockrell, 5 Pet., 248, *254*. And if the clerk cannot by certifying it make that of record which is not, *certainly counsel cannot patch up a record by recitals in draft orders, bonds or other papers. A recital in a citation, even, that an allowance of an appeal was obtained at a certain time, does not prove the fact.* Edmondson vs. Bloomshire, 7 Wall. 306, *313*. So in Sage vs. R. Co., 6 Otto, 712-16, the Supreme Court says: "It is true that the bond accepted in this case, recites an allowance of an appeal in open court, *but this is mere surplusage, etc.*" "The return of process contained in the record on appeal must control, etc, *no presumption can be indulged that there was some other and different service of process* made from that which

appears in the record." Lonkey vs. Keys S. M. Co., S. C. of Nevada, and cases cited (17 L. R. A. 351). Presumptions cannot controvert facts and there are no presumptions in favor of the jurisdiction of the United States courts. "*An unnecessary statement in the Marshal's return is not conclusive of the court's jurisdiction.*" The Lindrup, 70 Fed. 718.

The fact that neither clerk nor counsel deemed it necessary to file certain papers, or KNEW HOW *to file them properly*, would be no excuse for their not being properly filed.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.) 883, *885*, already cited, the court says: "It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court for which the appellant is not responsible. We cannot assent to this. * * * *It was not the business of the clerk of the Circuit Court, to obtain such an order, file it in his office, or transmit it to the Court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same.*" See also Warner vs. T. &. P. R. Co., 54 Fed 920, already cited. "It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals for writs of error. This is the office of parties, or of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endorsement on the writ of error. He relied on the clerk to do for him what the clerk s under no official obligation to do. He complained w .i no very good grace of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request, etc."

In the case at bar there does not appear to have been any such request, even, made of the clerk.

In Gregory vs. Pike, (C. C. A.) official reports Vol. 21,

part 4, page 477, the court says: "We have no power to compel any party to bring up a record (unless by certiorari). * * * *We have, however, an inherent power to dismiss unless a proper transcript is filed, which may be exercised under the rules* or *specially*."

Our next motion is to dismiss or quash the writ of error in this cause for want of jurisdiction, because in the first place;

1. NO PROPER OR LEGAL CITATION ON SAID WRIT WAS ISSUED OR SERVED.

A citation is *simply a notice* to the opposite party to appear or decline to appear (Cohens vs. Virginia, 6 Wheat. 264, *411*), *but, in a law case*, and especially after the term at which final judmgent was entered has passed, *it is necessary to give the agppellate court juisdiction.*

"The act of congress makes tde citation necessary in order to remove a case to this court by writ of error." * * * "The case now before us was not brought up by the first writ *for want of a citation."* Hogan vs. Ross, 11 How. 294, *295-7*. Except that when the appeal is prayed at the same term when the decree or sentence is made, a citation is not necessary. The San Pedro, 2 Wheat. 142; Yeaton vs. Lenox, 7 Pet. 220. And *when neeessary the law requires it to be formally and legally correct and proper, and the Supreme Court or Circuit Court of Appeals "has no power to receive an appeal" (or writ of error) "in any other mode than that provided by law."* Villabolos vs. U. S., 6 How. 81, *90*.

The citation in this case is drawn as if it were a writ. It runs in the name of the President of the United States and bears teste of the Chief Justice of the United States. It is, to be sure, signed by the judge instead of the clerk, but it is a general rule of law that a judge can do anything that his clerk can do and a good deal more. *We claim that this citation is*

informal, irregular and ineffective for any purpose. If a citation not properly signed is no citation and the defendant is not bound to appear unless the citation is signed in the manner prescribed by law (U. S. vs. Hodge, 3 How., 534), and a citation not served is as no citation (Loyd vs. Alexander, 1 Cranch, 365), and, if a writ that ran in the name of the Chief Justice of a state Supreme Court, and bore teste of that Chief Justice, was no writ and could not, under R. S. section 1005, be amended because there was nothing to amend (Bondurant vs. Watson, 13 Otto, 278-280); surely we are right in our contention *that this citation is no citation, and although we have admitted service of it, and entered a special appearance, this court has no jurisdiction over us and must dismiss the case.* "*The defendant is not bound to appear here unless the citation is signed,*" (*why cannot we add: and otherwise drawn*) "*in the manner prescribed by law, and as that has not been done in this case the writ must be dismissed.*" U. S. vs. Hodge, *supra.*

"Where it appears * * * that *no citation has been issued to the defendant the writ must be dismissed.*" Hogan vs. Ross, *supra.*

"The record is brought irregularly and the cause must be dismissed." (Because the citation was to appear at the current instead of the next term of the Supreme Court.) Yeaton vs. Lenox, *supra.*

Where, among other irregularities, the citation was issued to one not a party to the record, the case was dismissed, although it undoubtedly gave the proper party notice. Davenport vs. Fletcher, 16 How. 142. And service of a citation on the executrix or law partner of counsel of record, is not sufficient, although the right counsel undoubtedly received notice. "The citation not being served on the party or his counsel, the cause is not brought into this court agreeably to the act of 1789, and the writ must therefore be dismissed for want of jurisdiction."

Bacon vs. Hart, 1 Black, 38, *39*. So if the citation differs from the writ of error in the description of the parties, the case will be dismissed, (Kail vs. Wetmore, 6 Wall. 451,) unless the misdiscription is not sufficient to mislead Peale vs. Phipps, 8 How. 256.

In a late case, says the Circuit Court of Appeals, "The transcript filed in this court does not show that *one* necessary step towards the taking and perfecting of an appeal has been taken, save only the filing in the court below of an assignment of errors." (No citation and no proper bond had been issued or given.) "No appeal having been taken and perfected as required by law and the rules of this court, the cause is ordered stricken from the docket." Phos. Co. vs. Edwards, 70 Fed. (C. C. A.) 728, *729*.

"It has been said *that this objection*" (want of proper citation) "*is a mere technicality and may be regarded as rather a matter of form than of substance, but this court does not feel itself authorized to treat the directions of an act of congress, as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this, is conferred upon the court by acts of congress and the same authority which gives the jurisdiction, has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions nor to change or modify them.* And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or or injustice, it is for congress to provide a remedy by altering the existing laws, not for the court. And as this appeal has been prosecuted in the manner directed within the time limited by the acts of congress, it must be dismissed for want of jurisdiction" U. S. vs. Curry, 6 How. 106, *113*.

If an appeal bond cannot operate as a supersedeas in a

law case (Saltmarsh vs. Tuthill, 12 How. 387,) how can a *writ* of citation operate as a citation in any case? Of course, counsel may waive service of, or any irregularity in a citation. Bigler vs, Waller, 12 Wall. 142.

"But a citation with due return or a waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. The writ therefore must be dismissed." Alviso vs. U. S., 5 Wall. 824. At the next term of the Supreme Court, it being shown that a proper citation had been signed, served and filed, and afterwards lost in a fire which destroyed the clerk's office, this Alviso case was reinstated. Alviso vs. U. S, 6 Wall. 457. *And we have not waived this irregularity in the citation by a general appearance or otherwise. We only admitted service and recipt of a copy of an irregular, informal and ineffective document.*

In Van Sant vs. Gaslight Co, 9 Otto, 213, it was held that a citation becomes unnecessary only when an appeal (or writ of error) is allowed in open court during the term at which the decree is rendered. *In the case at bar a cition was necessary because it is a law case and the writ of error was not sued out and allowed during the term at which the judgment was rendered.* If the citation were unnecessary it would not, of course, make any difference whether it were irregular and informal or not. In the case of United States vs. Gomez, 1 Wall. 690, a citation was dispensed with but the case was quite peculiar. An appeal was taken in open court at the same term in which an order restoring an original decree was made and when both parties were in court and a motion was at once made to set aside the order granting the appeal. In such a case the Supreme Court might well hold no citation necessary.

The case of Innerarity vs. Byrne, 5 How. 295, which holds that the citation is not necessarily a part of the record and the case of Pierce vs. Cox, 9 Wall. 786, which holds that the *ap-*

pellant could not dismiss the appeal for want of a citation, the appellee being in court and making no objection to the want of a citation, and the case of Dayton vs. Lash, 4 Otto, 112, 113, which holds that a proper citation properly and actually issued need not be served before the first day of the next term of the Supreme Court in order to preserve the jurisdiction of that court; *do not militate in the least against our position that a proper citation properly issued and served, or a waiver thereof by general appearance or otherwise, is indispensable to the jurisdiction of the appellate court.*

Even after a case was argued and determined in the Supreme Court without an appearance on the part of an appellee, and at the next term it was made to appear on motion that the citation was never served, the court declared its decree of the preceding term null and void and revoked the mandate to the lower court. Ex-Parte Crenshaw, 15 Pet., 119.

And a writ of error to a state court was dismissed because the citation was signed by a district judge instead of by the Chief Justice, Judge or Chancellor of the court rendering or passing the judgment or decree, or by a Justice of the Supreme Court of the United States. Palmer vs. Donner, 7 Wall, 551. Another writ of error to a state court was dismissed because the citation was signed by one of the Associate Justices instead of by the Chief Justice of the State Court. Bartemeyer vs. Iowa, 14 Wall., 27.

The original citation subscribed by the judge must be returned with the writ of error. Wilson vs. Daniel, 3 Dall, 401.

A citation issued on the 27th of August, 1847, could not bring up an appeal returnable to the December term, 1846. U. S. vs. Curry, *supra*.

"The want of proof that the defendant was" (properly) "cited, has always been held to be a fatal defect in the process

prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record. Nor can this mistake be corrected by a citation from this court. The act of congress requires it to be issued by the judge or justice who allows the writ of error and it cannot be legally issued by any other judge or court. The case must therefore be dismissed for want of jurisdiction in this court." Ins. Co. vs. Mordecai, 21 How., 195. See also Porter vs. Foley, 21 How., 393.

Even the presence of counsel in court will not do away with the necessity of a citation and a proper citation. Castro vs U. S. 3, Wall, 46, 51. As to the importance of every step in the proceedings besides the cases already cited see Stm. Virginia vs. West, 19 How., 192; Mesa vs. U. S. 2 Black, 721.

The omission to serve the citation before the return day is fatal. City of Washington vs. Dennison, 6 Wall., 495.

The citation is essential to the validity of the writ and without it the writ will be quashed, and a citation not served is as no citation. Loyd vs. Alexander, 1 Cranch, 365. The writ brings up the record and the citation the parties. Cohens vs. Va. 6 Wheat., 410; Atherton vs. Fowler, 91 U. S. 146.

In Chaffee vs. Hayward, 20 How., 208, a writ of error was sued out in October, 1856, returnable at the December term, next following, but the citation was signed by the clerk instead of the judge. The record was filed with the clerk of the Supreme Court and the case was placed on the docket upon the 24th of November, and on the 4th of December the defendant appeared in that court by counsel. At the next term, December, 1857, a motion was made to dismiss the cause on account of the insufficiency of the citation. Chief Justice Taney in disposing of the motion said: "*The citation is undoubtedly* ir-

regular in this respect, and the defendant in error *was not bonnd to appear under it, and if a motion had been made at the last term, within a reasonable time, to dismiss the cause on this ground it would have been dismissed. * * * The latter (the defendant in error) is not bound to appear unless he is legally cited*, except for the purpose of moving to dismiss."

And right here we may add that neither this court, nor the court below, can allow the citation to be amended A citation to an appellate court is not (nor is a writ of error) included in the 32d section of the Judiciary Act of 1789 (R. S. Sec. 954), sometimes called the statute of amendments and jeofailes, nor is the citation mentioned in the 3rd section of the act of June 1, 1872 (R. S. Sec. 1005). And no admendment of the record is allowed to support the jurisdiction of the appellate court, in accordance with the common law maxim that all amendments are granted for the *support* of judgments not to *reverse* them. Another reason for not allowing amendments to citations, is that a citation may be entirely waived if the case is in other respects regularly brought up, or, the court having by a *proper* writ of error, *properly used*, obtained jurisdiction of the case, can, upon terms and within the lifetime of the writ, allow a new citation to be taken out.

We now come to the *last*, but not *least*, ground of our motion to dismiss for want of jurisdiction, and we beg the court to consider, in this connection, all that we have hitherto said which is applicable to this our principal point. We labor under the disadvantage, or perhaps advantage, of discussing horn-book questions, to any one of which all that may be said upon any one of the others applies. If the court will do this it will save itself and us much vain and tedious repetion.

We have been compelled to allude several times to several leading cases, and the many cases which we cite in this brief

are only a few of those examined, yet we fail to find a single case that either directly contradicts or even seriously conflicts with our contentions. If it be asked why do we go so far back for authorities, we reply that we always like to begin at the beginning, and that these old cases like old landmarks, seem to us more venerable and authoritative than later cases.

II.

THE WRIT OF ERROR HEREIN WAS NOT FILED IN THE COURT BELOW.

This omission to file this writ is apparent on the face of the record, and is fatal to the jurisdiction of this court. If this court *could* overlook the omission of a formal return to the writ of error, and the manifold disobediences of the rules and practice of both this court and the Supreme Court of the United States in proceedings in error already pointed out; it cannot, and, of course, will not disregard the laws governing writs of error as construed by both this court and by the Supreme Court of the United States, the decisions of which courts upon the interpretation and construction of such laws are a part of the laws themselves.

There is "no hinge nor loop to hang a doubt on" about the fact that this writ of error was not filed in the court below.

The original writ of error has come up and proves itself and what has been done, or not done, with it.

In Amis vs. Pearle, 15 Pet., 211, instead of a certificate from the clerk of the court below that the writ of error had been duly sued out and allowed, the original writ of error signed by the clerk of the court below, and also a citation signed by the judge of the court, were produced by the defendant in error, and the court says that the production of the writ of error with the citation was the *highest* evidence of the fact, and that the substance of the rule was complied with.

There is no room for supposition nor assertion here. *The original record or writ certainly imports verity.* See Hudgins vs. Kemp, *supra*. It is what the *record shows* that governs. Bondurant vs. Watson, 13 Otto, *278*, *281*, *285*; O'Dowd vs. Rus sell, 14 Wall., 402, *405*. In this last case *the writ of error was filed in the court below*, although it was by an obvious mistake, which did not vitiate it, antedated.

The jurisdiction of all United States courts is special, and there are no presumptions in favor of their jurisdiction. These propositions rest upon decisions innumerable. Moreover, "The facts upon which the jurisdiction of the courts of the United States rest must, in some form, *appear in the record* of all suits prosecuted before them. *To this rule there are no exceptions.*" Ex l'arte Smith, 4 Otto, 455, 456. Carter vs. Bennett, 15 How., 354-357. "And if a defect in jurisdiction appear in this transcript it cannot be cured by amendment because consent cannot give nor legalize jurisdiction." Mordecai vs. Lindsay, 19 How., 199, *200*; Balance vs. Forsyth, 21 How., 389.

As long ago as 1789, the Supreme Court of the United States held: "This court will not take cognizance of any suit or controversy which was not brought before them by the regular process of the law." Dewherst vs. Coulthard, 3 Dall., 409.

No amendment can be allowed to be made to this writ, not only on account of the old common law maxim already alluded to, and because the power of amendment presupposes the juisdiction of the court which attempts to exercise it; but because the defect (want of filing in the court below) *is not a defect of form.* This writ *does not lack form* even a little: it lacks *proper use*—execution—a much more serious and *fatal lack.* Until the act of June 1, 1872 (R. S. Sec. 1005), no writ of error was amendable in the Supreme Court *in any particular, even by consent of parties.* Hodge vs. Williams, 22 How., 87. Since then the Supreme Court of the United States may,

in its discretion, allow a writ of error to be amended, *in some cases*, and in particulars of *form only*. *This case does not come within the terms of that section*, even if this court were the Supreme Court.

In Mossman vs. Higginson, 4 Dall., 12, a writ of error duly issued and *filed* in the court below, was allowed to be amended by filling a blank left for the return day, there being an endorsement on the writ of the return day; but the writ was dismissed after all because the record did not show jurisdiction,

Nor can certiorari reach this defect of filing. A writ of certiorari, if seasonably and properly applied for, can bring up any omitted portion of the record of what *was done* in the court below. What was *not done, and so could not become of record*, cannot, of course, be brought up by such a writ. And a motion for certiorari to supply defects in the record, even, will be denied, the court being satisfied from an inspection of the record that the granting of the motion would avail nothing, it being necessary to dismiss for want of jurisdiction. Brown vs. Willey, 4 Wall., 165.

The omission of a clerk's certificate cannot be remedied by certiorari. Hodges vs. Vaughan, 19 Wall. 12.

We have not, even if we could have, waived our right to make this motion, either by a *general* appearance, by *unnecessary delay*, or *in any other way*.

"Want of citation may be waived, but *not want of regular writ of error*, and although a motion to dismiss for want of citation must be made at the first term at which the party appears, yet the want of a writ of error, such as is prescribed by the act of congress, stands on different ground." Even a general "appearance does not preclude the party from afterwards moving to dismiss for want of jurisdiction, or upon any other sufficient ground. And in the case of the United States

vs. Curry, supra, the court held that where the power of the court to hear and determine a case is conferred by acts of congress and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them. Upon this ground (no proper writ of error) the case is not legally before us, and must be dismissed for want of jurisdiction." Carroll vs. Dorsey, 20 How., 204, 208.

The Supreme Court in Mussina vs. Cavazos, supra, says: "It cannot, therefore, be maintained that a rigid and literal fulfillment of everything prescribed in that section (R. S. 997) is an absolute and indispensable requisite to the appellate jurisdiction of this court" to justify itself in merely overlooking the want of a return of an original writ of error that had been duly issued, *filed* and served and a certified copy sent up with the transcript, the original having been burned before it reached the appellate court. This very case, one among many, illustrates the strictness with which all provisions of law for review to appeals or writs of error are interpreted and construed.

"The rules, regulations and restrictions as to the time within which the writ of error may be brought, and when it shall operate as a supersedeas, the citation, the security to be given, and the restrictions upon the appellate court as to reversal are all applicable" (to an appeal as to a writ of error.) The San Pedro, *supra*.

Counsel have maintained, even in the Supreme Court of the United States, that the writ of error is a "useless, antiquated document." McVeigh vs. U. S., 8 Wall., 640. But what says the Supreme Court: "This court has no appellate power over the judgment of the court below, *unless the judgment is brought here according to the act of congress*—that is, by

writ of error. * * * *This writ is not mere matter of form, but matter of substance, prescribed by law and essential to the jurisdiction of this court.*" Hoge vs. Williams, 22 How, 87.

"And it is *immaterial in this respect whether it was the mistake of the party or of the court.* For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error upon any equitable ground. No such power is given to them by law." Saltmarsh vs. Tuthill, 12 How., 287, *289*.

And, since by the act of 1803, (R. S. Sec. 1012,) the same rules, regulations and restrictions, as are or may be prescribed in law in cases of writs of error apply to appeals; all the decisions imposing the strictest possible construction upon the provisions of law for review by appeal apply equally to the provisions for review by writ of error.

To show how particular and exacting the Supreme Court is with regard to writs of errors: Prior to the adoption of the act of May 8, 1792, (R. S. Sec. 1004), a clerk of a circuit court could not issue the writ. West vs. Barnes, *2* Dall., 401.

"A paper, not a proper writ of error, cannot be amended, and as such a writ" (why cannot we add a proper writ properly used) "is necessary to our jurisdiction the suit is dismissed." Bondurant vs. Watson, 13 Otto, 278, 281.

A writ of error without a seal is void. Overton vs. Cheek, 22 How., 46; Washington vs. Dennison, 6 Wall., 495.

So if the names of the parties are not set forth in the writ it will be dismissed. Deneale vs. Shimp, 8 Pet., 526; Wilson vs. Ins. Co., 12 Pet., 140; Smyth vs. Strader, 12 How., 327.

"If the writ of error had been served when it was not in force, that is, after its return day, such service would have been void." Wood vs. Lide, 4 Cranch, 180.

"The writ has become a nullity because it was not returned at the proper term. It cannot of course, be a legal instrument to bring the record of the Circuit Court before us for revision." Hamilton vs. Moore, 3 Dall., 371; Blair vs. Miller, 4 Dall., 21.

The right to a writ of error ought not to be finally passed upon by a judge at chambers. Buel vs. Van Ness 8 Wheat., 312.

"It behooves this (the Supreme) Court in every case, more especially in this case, to examine into its jurisdiction with scrutinizing eyes before it proceeds to the exercise of a power which is controverted." Worcester vs. Georgia, supra 536.

A motion to dismiss for want of jurisdiction, will always be heard in advance of argument on the merits. Semple vs. Hager, 4 Wall., 431. The sillabus in this last case reads: "*When want of jurisdiction is patent or can be readily ascertained by an examination of the record* in advance of the examination of the questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction." And the syllabus of Edmondson vs. Bloomshire, 7 Wall., 306, 313: "*If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed though neither party ask it.*"

In United States vs. Bannister, 70 Fed., 44, the court says: "The defendant has moved to dismiss the writ, etc., for irregularities on a special appearance for this purpose. As these things are apparent from the process and return as a part of the record, this mode of objecting to them seems under the practice of the state" (and we may add of the United States) "to be proper."

In Hunt vs. Blackburn, 127 U. S. 774 (8 S. C. R. 1395)

says the Supreme Court: "After an examination of the record in this case which was submitted on printed arguments we have not been able to find any evidence of the value of the land in controversy which is the subject of this suit. It is therefore dismissed for want of jurisdiction."

Upon the question of jurisdiction of the appellate court, the Supreme Court in the case of Edmondson vs. Bloomshire, *supra*, "*And the court has never hesitated to act* * * * although *no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court we cannot do otherwise.* In the case of U. S. vs. Curry, Chief Justice Taney, answering the objection that the rule was extremely technical, replied that *nothing could be treated by this court as merely technical and for that reason be disregarded which was prescribed by congress as the mode of exercising the court's appellate jurisdiction.* We make the same observation now and add that it is better if the rule be deemed unwise or inconvenient to resort to the legislature for its correction than that the court should depart from its settled course of action for a quarter of century."

A question of jurisdiction cannot be waived. Mex. Nat. R. R. Co. vs. Davidson, 157 U. S., 201. And the circuit court of appeals cannot take knowledge, actual or judicial, of what may appear upon the records of the district and circuit courts within the boundaries of the judicial circuit; and to support the right of appeal, cannot assume the existence of necessary facts which do not appear of record in such court. Fitzgerald vs. Evans, 49 Fed. (C. C. A.), 423.

It is idle to claim that the writ was properly brought because the office of a writ has been performed. In a late case a writ of error was allowed, a bond filed, and a citation issued *all in good time;* but says the court, "The record, however, does not show that any writ of error was actually issued in the

case. On this state of facts the motion made to dismiss the case for want of jurisdiction must be granted. (Citing) Mussina vs. Cavazos, 6 Wall, 355, 358: Ex Parte Ralston, 119 U. S. 613 (7 S. C. R. 317) So ordered" Smith vs. Ferst, 66 Fed. (C. C. A) 798. The court has absolutely no jurisdiction without a writ of error. Even argument and submission on the merits cannot waive this. Stevens vs. Clark, 62 Fed. 321.

The purpose of the writ would have been accomplished by procuring the transcript of the record from the clerk of the court below, and filing it in this court, but such a proceeding could not confer jurisdiction upon this court. Not even consent of counsel to dispense with the writ, or with any necessary action under it, could give this court jurisdiction. Mordecai vs. Lindsay, 19 How., 199; Balance vs. Forsyth, 21 How., 389.

Now what is the law with regard to filing writs of error?

The original judiciary act of 1789, the act of 1792, which provides that the writ of error may be sued out either from the Supreme Court of the United States or from the Circuit Court of the United States (under this act the form of a writ of error was devised by the justices of the Supreme Court and transmitted to the clerks of the Circuit Courts); and the act of 1803, which separates appeals in equity and admiralty from writs of error in law cases, but subjects appeals to the same rules and regulations and restrictions as are or may be prescribed in law in cases of writs of error, as interpreted and construed by the courts; are all not only *sub silentio*, but *expressly* included and re-enacted in the 11th section of the judiciary act of 1891,—the act establishing this court,—a portion of which 11th section reads: "All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act * * * ."

If the act of 1891, had merely authorized appeals and

writs of error without reference to previous provisions of law, the provisions of all these judiciary acts would still apply. Castro vs. U. S., 3 Wall, 46, 51; U. S. vs. Pacheco, 20 How., 261, 264; Thomas vs Harvie's Heirs, 10 Wheat., 146.

"Brought" in the original judiciary act of 1789, and in the Revised Statutes, Section 1008, is equivalent to "sued out" in the same original act, as amended, and in the Revised Statutes, section 635, and in the judiciary act of 1891, section 11. This is illustrated and acted upon in every case involving the time within which review by appeal or by writ of error in an appellate court can be had. The cases which follow sufficiently sustain this interpretation and construction.

A writ of error then is not brought or sued out, in the legal meaning of the term, until filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court and gives that court jurisdiction of the case. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question of jurisdiction.

The leading case on the subject is so short and to the point, that we beg to quote nearly the whole of it. Chief Justice Taney delivered the opinion of the court.

"This case is brought here by writ of error * * * and a motion has been made to dismiss the writ. It appears by the record that the judgment was rendered on the 25th day of October, 1843. The writ of error by which the case is brought here was allowed on the 19th of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered and on the same day, *as appears by endorsement upon it, filed in that office* by the counsel for the plaintiff in error.

More than five years from the day of the judgment had therefore elapsed *when this writ of error was filed.*"

The act of 1789 c. 20, Section 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. *The writ of error is not brought in the legal meaning of this term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court,* and the period of limitation prescribed by the act of congress must be calculated accordingly. *The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.*

In this case, therefore, five years had elapsed before the writ of error was brought and the limitation of time in the act of congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defense by plea. * * * But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court, and either party, without any formal assignment of errors, or plea, may avail himself of any objection *which appears upon the record itself.* In this case the bar arising from the lapse of time, is *apparent on the record and the defendant may take advantage of it by motion to quash or dismiss the writ.* * * * The writ must be dismised upon the ground that it is barred by the limitation of time prescribed by the act of congress." Brooks vs. Norris, 11 How., 204-208.

According to this case the question of the jurisdiction of this court not only turns upon the *filing and endorsement thereof of this writ in the court below but any objection apparent upon the face of the record can be taken advantage of by motion to quash or dismiss the writ.* This case not only decides

our motion but *justifies* us in thus bringing the question up by motion.

And this case does not stand alone. It is cited and followed in a long line of cases, federal and state. Mussina vs. Cavazos, 6 Wall., 355, 363; Cummings vs. Jones, 104 U. S., 419: Scarborough vs. Pargoud, 108 U. S., 567 (2 S. C. R. 877); Pollys vs. B. R. Impt. Co., 113 U. S., 81 (5 S. C. R. 369); Credit Co. vs. Ry. Co, 128 U. S, 258, (9 S. C. R. 107,); Farrar vs. Churchill, 135 U. S. 609 (10 S. C. R. 771); U. S. vs. Baxter, 51 Fed. (C. C. A,) 624; U. P. Ry. Co. vs. C. E. Ry. Co., 54 Fed. (C. C A), 22; Warner vs. T. & P. Ry. Co., 54 Fed., (C. C. A), 920, 921, 922; Stevens vs. Clark, 62 Fed., (C. C. A), 321; Threadgill vs. Platt, 71 Fed., 1; Crippin vs. Livingston, 12 Fla., 638; and Wright vs. Hughes, 2 Green, (Iowa), 142.

If there is safety in the multitude of authorities, we are certainly safe in our contention and position.

In the case of Mussina vs. Cavazos, supra, the original writ of error had been destroyed by fire during the late civil war, so that it could not be returned with the transcript and the court was therefore asked to dismiss the case for want of jurisdiction. This it declinee to do because the writ had been duly issued and *filed* in the court below as appeared from a copy of it in the transcript. Besides the case of Brooks vs. Norris, the case of Ableman vs. Booth, 21 How., 506, is cited to the point that it is *the filing of the writ in the court which rendered the judgment and not even the return of the writ which is the principal, the indispensable requisite to the jurisdiction of the appellate court.*

The case of Polleys vs. R. R. Improvement Company, supra, turns upon the file mark of the clerk of the court to which the writ was directed. "It follows that the writ of error in this case was brought five days after the two years allowed by law had expired; and it must be dismissed."

In the Credit Company vs. Railway Company, supra, the record on appeal shows that the petition for appeal, the allowance, citation and bond were *endorsed filed by the clerk of the court below five days after* the time within which an appeal could be taken had expired, and the appeal was accordingly dismissed, although argued and submitted to the appellate court upon its merits without objection of making a motion to dismiss and so far as the delay of five days could be waived by the parties, it was waived, and although an attempt was made to cure this defect of jurisdiction by an order of court nunc pro tunc. As to which last effort the court says: "When the time for taking an appeal" (or suing out a writ of error, see R. S. section 1012, and even the former portion of this same decision) "has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken" (or a writ of error sued out) "would be a dead letter. The appeal must be dismissed."

In case of Farrar vs Churchill, supra, a final decree was rendered November 5, 1885. On October 31, 1887, certain defendants presented a petition for a cross-appeal to a justice of the Supreme Court and obtained an allowance thereof, an appeal bond being approved and a citation issued on that day. This petition was filed in the circuit court on the 7th day of November, 1887. By an endorsement upon the citation service of the same was accepted and an appearance of appelle entered on the 5th day of November, 1887 And yet, the Supreme Court dismissed the crossappeal. "Crossappeals must be prosecuted like other appeals. * * * And so when a crossappeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the crossappeal under the statute. As in this case the petition, order and bond *were not filed in the Circuit Court* until after two years had elapsed from the entry of the decree the crossappeal must be dismissed."

This certainly illustrates the fact that the right of review is strictissimi juris; although the crossappeal was allowed by a justice of the Supreme Court of the United States, a bond was approved, and a citation issued and served, *all in due time*; yet, because the petition for, and the allowance of, the cross-appeal was not filed in the court below until two days after the time within which to appeal had elapsed, the crossappeal *was summarily dismissed, an order nunc pro tunc to the contrary notwithstanding.*

If this were only the practice of the Supreme Court it would suffice for us, because Rule 8 of this court adopts that practice; but it is the law and practice of all the courts of the United States incorporated even in the last judiciary act—the act establishing this court—and as expounded by the highest court in the land, or for that matter in any land, and followed by all other United States Courts, it is as inexorable as a law of the Medes and Persians. Although the Supreme Court very properly leads the way in this most sound exposition of this law, all the other courts follow in its footsteps. The leading case on this subject in the Circuit Court of Appeals is the case of the United States vs. Baxter, 51 Fed. (C. C. A) 624. And 'tis enough for us to say of that case that it covers the ground. The case of the U. P. Ry. Co. vs. The C. E. Ry. Co., 54 Fed., (C. C. A.), 22, cites and follows the leading case but adds nothing to it.

The case of Warner vs. T. & P. Ry. Co., 54 Fed (C. C. A), 920, 921 and 922, is, in addition to the main point decided, so instructive in many respects, that we cannot forbear quoting some of it.

"The policy of the law in the creation of this court shows marked liberality in allowing appeals from trial courts in all cases, and, on the other hand, requires a speedy prosecution of all appeals or writs of error. It is no part of the clerk's duty,

as clerk, to procure the allowance of writs of error and the approval of bonds of appeals or writ of error. This is the office of parties, or of their attorneys and solicitors. It is also clearly not the duty of the clerk, or his privilege, to change the writ of error after it is allowed by erasing and inserting a date, or by adding a date, any more than it is to make any other alteration in such papers. Nor may he without the order of the proper court or judge, erase *his own file mark* on a paper which parties have procured to be filed. * * * The parties have a right to appeal or sue out writs of error from all final judgments or decaees and from certain interlocutory decrees, if that right is *invoked* in time and *in the prescribed form.* A part of this prescribed form is for one of the judges of the trial court to allow the appeal or writ of error, and the appeal or writ of error is not 'taken or sued out' until that allowance is obtained. Barrel vs. Trans Co., 3 Wall., 424; Brooks vs. Norris, 11 How., 204; Scarborough vs. Pargoud, 108 U. S. 567. And parties and their attorneys sometimes incur serious hazard of losing their right of appeal by omitting to take the proper steps in due time. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do. He complains, with no very good grace, of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request." In this case, the petition for, and allowance of, the writ of error, and the writ of error itself, having been filed in the lower court in time, the motion to dismiss was, of course, denied.

In the next Circuit Court of Appeals case cited, the case of Stevens vs. Clark, supra, the court says:

"The Supreme Court has uniformly held that it can ob-

tain appellate jurisdiction in a case at law only by the issuing by the proper authority of a writ of error, and by filing the same in the court which rendered the judgment. Consent will not give jurisdiction and *if at any time the record does not show the necessary facts to give the court jurisdiction, the court will dismiss the case.* The jurisdiction of all the United States courts is special. The Supreme Court and the Circuit Court of Appeals possess no appellate power in any case unless conferred upon them by act of congress; nor can such jurisdiction when conferred, be exercised in any other form or by any other mode of proceeding, than that which the law prescribes." (Citing a good many cases)

In Threadgill vs. Platt, supra, says the Court: "The appellate court cannot entertain a writ of error until it is *filed in the court which rendered the judgment.* (Citing our cases.) *To give the Circuit Court of Appeals jurisdiction the writ of error must be issued and filed by the court below* within the time prescribed by law." We intended to quote these last two decisions almost *in extenso*, but we forbear and leave it for the court to refresh its memory of them.

We cite only two state court cases because we do not deem them entitled to much weight. Decisions of state courts upon United States laws and practice are not binding upon United States courts. Section 914 of the Revised Statutes of the United States which assimilates United States with State practice, as far as may be, "does not extend to means of enforcing or revising a decision of a federal court, or to the manner or time of taking a case from one federal court to another by writ of error, bill of exceptions or appeal." U. S. vs. Train, before Mr. Justice Gray, 12 Federal, 852. See also Castro vs. Uriarte, Id. 259 "State practice must give way whenever to adopt it would be inconsistent with, defeat the purpose, or impair the effect of, legislation of congress." Luxton vs. U. R.

Bridge Co., 147 U. S., 337 (13 S. C. R 356) and cases cited. Also Chappell vs U. S., 16 S. C. R. 397. "The power of making amendments and the mode of removing a case from an inferior to an appellate court of the United States are regulated by acts of congress, and do not depend upon the laws or practice of the State in which the court may happen to be held." Hudgins vs. Kemp, supra, 536, beginning at the bottom of the page; Gelston vs. Hoyt, 3 Wheat., 246.

In Crippin vs. Livingston, supra, the court cites and follows our leading Supreme Court authority and in Wright vs. Hughes, supra, the court says: *"In order to prevent abuse of the law"* (limiting time in which to appeal or sue out writ of error) "we deem it the safest rule to be guided by the date the writ was served upon or *filed by the clerk of the district court to whom it is directed. * * * The motion to dismiss is granted.*"

There can be no possible shadow of a doubt about either the law or the facts involved in these motions.

The writ of error in this case was not even *issued at all* nor *delivered to nor received by anybody*, nor deposited anywhere (although it was entered in the law register of the court below as having been *issued, not* as having been filed.) To issue is *"to sue out or deliver officially."* This was not so set out, until it was sent up here, and it was not delivered to or received by anybody or deposited anywhere, until it was sent up and deposited here, where it was for the first time in its life, both deposited and filed.

The writ of error in this case was not even issued or deposited anywhere, although it was entered in the register of the court below as having been issued (*not filed.*) To issue is to "send out" or "deliver officially." This writ was not so sent out until it was sent up and deposited here *where it was for the first time both deposited and filed.* A paper cannot be said

to *be issued* to a party or attorney, when it is *simply made out*, nor can it be said to be *filed or even deposited when it is simply left uncalled for with the person who made it out*

We have now arrived at the end of our *brief* journey and we rest, confident that the court will carefully consider all our several points, arguments, and authoricies, *all converging and merging, as they do, in the* ONE POINT—THAT THE ONLY WAY KNOWN TO THE LAW WHEREBY A CASE AT LAW CAN GET INTO AN APPELLATE COURT HAS NOT BEEN FOLLOWED IN THIS CASE, AND THAT CONSEQUENTLY THIS COURT HAS HO JURISDICTION OF IT, AND IT MUST BE DISMISSED.

Respectfully submitted,

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